

The Central Law Journal.

ST. LOUIS, JULY 6, 1883.

CURRENT TOPICS.

An important amendment to the Statute of Frauds is pending in the English Parliament. The *Solicitor's Journal* states the substance of the proposed enactment with some unfavorable comments, as follows:

"No time should be lost by the profession in studying Mr. Reid's 'Bill to amend the Statute of Frauds,' which passed a second reading on Wednesday last *sub silentio*; which is one of the very few bills not blocked by Mr. Warton; and which may now be considered as having just a chance of becoming law in a couple of months. By this bold little measure it is proposed to enact that where, by the Statute of Frauds, or any statutory amendment thereof, 'any contract ought to be in writing, or signed or sealed by any person,' any party to an action 'against whom the absence of such writing or signature is relied on may 'interrogate in writing or by word of mouth any other party to such action as to such contract, and require him to answer upon oath whether the same was made, and what were the terms thereof.' If it appears, 'either by such answer or otherwise by admission of such party,' that 'there was a contract otherwise sufficient in law,' such contract so stated or admitted is to be deemed a good contract, and capable of being enforced in law between the said parties, notwithstanding the same was not in writing, or signed or sealed, as required by law'—with a saving for the right to refuse to answer criminating questions. Clause 2 provides for answers by officers of corporations, trustees in bankruptcy, and liquidators of companies; and clause 3 provides that 'in this act the word action includes any proceeding in bankruptcy, or in the liquidation of any company, or in the administration of any estate;' and so ends this remarkably revolutionary project. The preamble to the bill sets forth that 'it is desirable to prevent justice being defeated by technicalities,' but it is, perhaps, even more important to prevent injustice from being accomplished by means of perjury. The Statute of Frauds was, as the preamble thereto recites, enacted 'for prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation;' and we think the curious little bill before us, if passed into law, would result in increasing perjuries to an alarming extent, and dangerously confusing and disturbing the law of contract."

We cannot agree with our learned English cotemporarv. It seems to us that the proposed measure tends distinctly in the interest of justice. It is entirely appropriate that one who seeks to take advantage of a technicality should be required to substantiate his good faith by his oath. We think this legislation well worthy attention and imitation in his country.

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MARRIED WOMEN'S DEBTS.

II.

In the Journal of March 30, 1883, the English rules upon this subject were given coupled with the promise that the rules in the United States should follow.

The rule there stated is that if a married woman is not restrained by the instrument creating the separate estate, she receives an absolute title with all the incidents thereof, and is therefore a *feme sole* with respect to that estate, but not with respect to her person,¹ and that all her contracts, made with respect to that property, including her bond, bill, note or other obligation are binding on her separate estate. On the other hand the principle, prevailing in most of the American courts, is that a married woman having separate estate, has no interest, control or power, but such as is expressly given by the instrument which created such estate, hence it follows that her powers are limited to the grant in the instrument. We have seen that having a separate estate, a married woman's contracts in writing, or not in writing, are binding on that estate when she expressly stipulates that the estate shall be charged therewith; that her bond, bill, note and contract in writing are binding on the separate estate when she does not expressly stipulate that they shall be charged thereon; and that all her other contracts or engagements are binding on the estate when they are made with reference to or upon the faith and credit of the separate estate, and whether they are or not, depends upon the circumstances of each case. Now, as a married woman can make a contract at law, which although not binding on herself, nor enforceable against her, is binding on her husband and enforceable against him, such as when she contracts for necessities upon his failure to provide them, and when she contracts as his agent, under express or implied authority; and as she, having a separate estate, can make contracts with respect to such estate, enforceable in equity, which, although not binding on herself, will bind her separate estate, she can, therefore, occupy a *dual capacity*, namely, when she contracts so as to

¹ The rule since the case of *Peacock v. Monk*, 2 Ves, 193.

bind her husband, and when she contracts so as bind her separate estate. There is no trouble when she expressly stipulates at the making of the contract which shall be bound, but when there is no express stipulation or when her contract can be construed so as to bind either her husband or her separate estate, there is some question and room for distinction.

The lead in departing from the English rule was taken by the court of appeals of South Carolina,² which held that a married woman has no power over her separate estate, and no capacity to contract or incur debts, but such as is given by the instrument creating the estate; and that unless the instrument expressly provides that the estate shall be liable for her debts and contracts, or, in the absence of this, that the obligation was incurred to effectuate the object and purpose of the trust, the estate is not liable for her contracts, written or unwritten, and as her person is not bound, such obligations are null and void. Following this, Chancellor Kent,³ advanced the opinion that the English cases were so floating and contradictory as to leave him free to adopt the true principle and that instead of holding that the wife is a *feme sole* to all intents and purposes as to her separate property, she is limited to the power given in the instrument. Instead of holding that she has an absolute power of disposition unless specially restrained by the instrument the proposition would be more correct, namely, that she has no power but what is specially given, and to be exercised only in the mode prescribed, if any such there be. Her incapacity is general and the exception is to be taken strictly, and to be shown in every case because it is against the general policy and immemorial doctrines of the law.⁴

² Ewing v. Smith, 3 Des. 417 in 1811. This case was doubted in Trustees of Frazier v. Center, 1 McCord. Ch. 270 in 1826, but in Magood v. Johnston, 1 Hill Ch. 228 in 1833, and in Robinson v. Ex'rs. of Dart, Dudly Eq. 128 in 1838. Harper Ch. said that since Ewing v. Smith, there was no doubt that a *feme* court has no power but such as is conferred by the instrument. This has been followed since Clark v. McKenna, Chev. Eq. 163; Reid v. Lamar, 1 Strob. Eq. 27; Rachell v. Tompkins, 1 Strob. Eq. 114; Cater v. Eveleigh, 4 Des. 19; James v. Magrant, 4 Des. 591; Montgomery v. Eveleigh, 1 McCord. 267; Adams v. Mackly, 6 Rich. Eq. 75; Magood v. Johnston, 1 Hill Ch. 228.

³ In 1817 case of Methodist Episcopal Church v. Jacques, 3 Johns Ch. 78; Same case in 17 Johns Ch. 548.

⁴ Kelly Contracts of Married Women, 254.

On appeal to the court of errors,⁵ Chancellor Kent was reversed and the opinion in harmony with the English rule was approved that unless specially restrained by the instrument creating the separate estate, a married woman is with respect to that estate a *feme sole* in equity, and may dispose of such estate without the consent or concurrence of her trustees, and charge it by her engagements when she indicates her intention to affect it and the specification of any particular mode of exercising her disposing power, does not deprive her of any other mode of using that right, not expressly or by necessary construction negated in the instrument. This rule was recognized and followed.⁶ Whilst this decision established the doctrine that a married woman's agreement would bind her separate estate when she, in that agreement, "sufficiently indicates her intention" to affect it, the courts had not, at this time, directly decided the question whether or not her general engagements were binding on her separate estate. Since then however, this question has been decided in the affirmative and the broad rule laid down, that a married woman's contracts would be valid when entered into with reference to or upon the faith and credit of the separate estate, or entered into with the intent to make the estate the debtor.

Subsequently it was held⁷ that not only must a married woman indicate her intention to charge her separate estate, but that intention must be declared in the very contract which is the foundation of the charge, or the consideration must be for and going to the direct benefit of the separate estate itself. This was approved,⁸ and then her intention express-

⁵ Jacques v. Meth. Church, 17 Johns Ch. 548.

⁶ Dyett v. N. A. Coal Co., 30 Wend. 570; Powell v. Murry, 2 Edw. 636, 10 Barb. 597; Wadhams v. Society, 2 Kern. 415; Albany Ins. Co. v. Bay, 4 Comst. 9; Cruger v. Cruger, 5 Barb. 227; Gardner v. Gardner, 22 Wend. 526; Vanderheyden v. Mallory, 1 Comst. 462; Strong v. Skinner, 4 Barb. 546; Guild v. Peck, 11 Paige 475; Whiteall v. Clark, 2 Edw. 149; N. A. Coal Co. v. Dyett, 7 Paige 9; Cummings & P. v. Williamson, 1 Sandf. 17; Diekeman v. Abraham, 21 Barb. 551; Coon v. Brook, 21 Barb. 546; Curtis v. Engel, 2 Sandf. 287; Know v. McComley, 10 Paige 345; Calvin v. Carries, 22 Barb. 371; Goodall v. McAdams, 74 How. Pr. 885.

⁷ Yale v. Dederer, 22 N. Y. 451; 18 N. Y. 265; 21 Barb. 286; 68 N. Y. 329; See Todd v. Lee, 15 Wis. 265.

⁸ White v. McNutt, 38 N. Y. 371; Owen v. Cawley, 36 N. Y. 600; Ballin v. Dillage, 37 N. Y. 35; Fowler v. Seaman, 40 N. Y. 592; Com. Ex. Ins. v. Babcock, 42 N. Y. 613; Frickling v. Rolland, 33 N. Y. 499; Se-

ed verbally was admitted.⁹ After this the court regretted¹⁰ that the doctrine was so settled and in one case¹¹ the intention to charge was allowed to be inferred from circumstances; but taking all the decisions together, the conclusion is that the English doctrine as heretofore stated is the rule in this State.¹²

The American doctrine as first advanced in South Carolina, and expounded by Chancellor Kent, that a married woman has no power over her separate estate but such as is given by the instrument creating it, and she can not therefore, charge the estate with her debts or contracts, unless the instrument expressly permits it, has been fully adopted in Pennsylvania,¹³ South Carolina, Tennessee,¹⁴ Mis-

delling v. Powers, 39 Barb. 555; Sedlie v. Vrooman, 41 Barb. 109; White v. Story, 43 Barb. 154; Bank v. Scott, 59 Barb. 641; Hansee v. Dewitt, 63 Barb. 53; Bogart v. Gulick, 63 Barb. 323; 45 How. Pr. 385; Noyes v. Blakeman, 2 Seld. 567; Rogers v. Ludlow, 3 Sandf. 104; L'Amoreaux v. Van Rensselaer, 11 Barb. Ch. 34.

⁹ Maxon v. Scott, 55 N. Y. 247; Weir v. Groat, 4 Hun. 193; Bank v. Miller, 63 N. Y. 639; Rohebach v. Ins. Co. 62 N. Y. 47.

¹⁰ M. B. & M. Co. v. Thompson, 58 N. Y. 80.

¹¹ Conlin v. Cantrell, 64 N. Y. 217.

¹² Loomis v. Ruck, 14 Abb. Pr. N. S. 385; Deck v. Johnson, 1 Abb. App. Cas. 497; Shorter v. Nelson, 4 Lans. 114; Manchester v. Sahler, 47 Barb. 155; Isham v. Schafer, 60 Barb. 317; Barnett v. Lichtenstein, 39 Barb. 194; Ainsley v. Mead, 3 Lans. 116; Corning v. Lewis, 54 Barb. 51; Smith v. Allen, 1 Lans. 101; Sexton v. Stonvenel, 35 Barb. 507; Ogden v. Blydenburgh, 2 Hilt. 182; Porter v. Mount, 41 Barb. 361; Adams v. Honness, 62 Barb. 326; Barton v. Beer, 35 Barb. 784; Leavett v. Peel, 25 N. Y. 474; Gibson v. Walker, 20 N. Y. 476. The exact question in Yale v. Sederer, was whether a married woman, having a separate estate, could create a charge upon that estate by giving a promissory note for the debt of her husband intending thereby to charge her separate estate, but without indicating this intention in any manner by the contents of the note and it was held that she could not. This case is in 21 Barb. 286; 31 Barb. 525; 18 N. Y. 265; 22 N. Y. 450.

¹³ Lancaster v. Dolan, 1 Rawle, 231; Syne's Ex. v. Crouse, 1 Barr. 111; Rogers v. Smith, 4 Barr. 98; Wright v. Brown, 8 Wright 244; Wells v. McCall, 14 P. F. Smith, 207; Thomas v. Folwell, 2 Whart. 11; Wagner's Est. Ashm. 448; Penn. Co. v. Foster, 11 Casey 134; Chrisman v. Wagoner, 9 Barr. 473; McMullen v. Beatty, 6 Smith, 389; Wallace v. Caston, 9 Watts. 187; Darrance v. Scott, 3 Whart. 306; Sharpless v. Westchester, 1 Grant 257; Curry v. Bolt, 3 Smith 320; Johnson v. Fritz, 8 Wright 449; Gamble's Est., 1 Parsons 489; Lippincott v. Hopkins, 7 Smith, 325; Murray v. Keyes, 11 Casey, 384; Hough v. Jones, 8 Casey, 432; Brunner's Appeal, 11 Wright, 67; Mahon v. Garmley, 12 Harris, 80; Moore v. Cornell, 18 Smith, 320; Pettit v. Fritz, 9 Casey, 118; Weiman v. Anderson, 6 Wright 311; Johnson v. Johnson, 1 Grant, 468; Hiney v. Phillips, 14 Wright 382; Steinman v. Ewing, 48 Pa. St. 63; Hartman v. Ogborn, 54 Pa. St. 120; Cummings v. Miller, 3 Grant 146; Remfelt v. Clemens, 46 Pa. St. 435; Park v. Kleeber,

Mississippi,¹⁵ Rhode Island,¹⁶ and North Carolina,¹⁷ whilst all the other States adopt in the main, the English doctrine, with little or no exception.¹⁸

37 Pa. St. 251; Keeney v. Goode, 21 Pa. St. 349; Walker v. Coover, 65 Pa. St. 439; Thomas v. Falwell, 2 Whart. 11.

¹⁴ Ware v. Sharp, 1 Swan 489; Margan v. Elam, 4 Verg. 375; Marshall v. Stevens, 8 Humph. 459; Sinton v. Baldwin, 8 Hump. 209. Kirby v. Miller, 4 Caldwl. 4.

¹⁵ Armstrong v. Stovel, 26 Miss. 275; Doty v. Mitchell, 9 Sm. & M. 435; Montgomery v. Bank, 10 Sm. & M. 567; Pallen v. James, 45 Miss. 129; Whitworth v. Carter, 43 Miss. 61; Dunbar v. Meyer, 43 Miss. 676; Robertson v. Bruner, 24 Miss. 242; Witcher v. Wilson, 48 Miss. 585.

¹⁶ Metcalf v. Cook, 2 R. I. 355.

¹⁷ Harris v. Harris, 7 Ired. Eq. 311; Frazier v. Brownlow, 3 Ired. Eq. 237; Newlin v. Freeman, 4 Ired. Eq. 312; Knox v. Jordan, 5 Jones Eq. 175; Rogers v. Hinton, Phil. Eq. 101; Pippen v. Wesson, 74 N. C. 442; Atkinson v. Richardson, 74 N. C. 458.

¹⁸ Alabama.—Gunter v. Williams, 40 Ala. 561; Paulk v. Wolfe, 34 Ala. 541; Baker v. Gregory, 28 Ala. 544; Osley v. Ikelheimer, 26 Ala. 332; Brame v. v. McGee, 46 Ala. 174; Nunn Admr. v. Givhan, 45 Ala. 375; Wilkeson v. Cheatham, 45 Ala. 341; Short v. Battle, 52 Ala. 456; Cawles v. Pallard, 51 Ala. 445; Puryear v. Puryear, 16 Ala. 486. Arkansas.—Aswald v. Moore, 19 Ark. 257; Dobbin v. Hubbard, 17 Ark. 196; Buckner v. Davis, 29 Ark. 447; Palmer v. Rankin, 30 Ark. 771. California.—Miller v. Newton, 23 Cal. 554; Macclay v. Love, 25 Cal. 367. Connecticut.—Imlay v. Huntington, 20 Conn. 149; Platt v. Hawkins, 43 Conn. 143; Wells v. Tharman, 37 Conn. 318; Taylor v. Shelton, 30 Conn. 122; Buckingham v. Moss, 40 Conn. 461. Florida.—Smith v. Paythress, 2 Fla. 92; Caulk v. Fox, 13 Fla. 148; Alston v. Rawles, 13 Fla. 117; Abernathy v. Abernathy, 8 Fla. 243; Sanderson v. Jones, 6 Fla. 430; Maiben v. Bobe, 6 Fla. 381; Lewis v. Yale, 4 Fla. 418. Georgia.—Fears v. Brooks, 12 Ga. 195; Wyly v. Collins, 9 Ga. 223; Weeks v. Sego, 4 Ga. 201; Dallas v. Heard, 32 Ga. 604; Roberts v. West, 15 Ga. 123; Morrison v. Solomon, 52 Ga. 206; Huff v. Wright, 39 Ga. 41; Seabrook v. Brady, 47 Ga. 650; Van Arsdale v. Joiner, 44 Ga. 41. Illinois.—Pomeroy v. Ins. Co. 40 Ill. 398; Carpenter v. Mitchell, 50 Ill. 470; Schmidt v. Postel, 63 Ill. 58; Furnee v. McGovern, 78 Ill. 388; Williams v. Hugunin, 69 Ill. 214. Indiana.—Reese v. Cochran, 10 Ind. 195; Cox v. Wood, 20 Ind. 54; Abdill v. Abdill, 26 Ind. 287; Kuntrowitz v. Prather, 31 Ind. 105; Hasheagan v. Specker, 36 Ind. 414; Hobson v. Davis, 43 Ind. 258; Shannon v. Bartholomew, 53 Ind. 54. Iowa.—Patton v. Kinsman, 17 Iowa 428. Kansas.—Knaggs v. Maston, 9 Kan. 532; Wicks v. Mitchell, 9 Kan. 88; Deering v. Boyle, 8 Kan. 525. Kentucky.—Bell v. Keller, 13 B. Mon. 381; Lillard v. Turner, 16 B. Mon. 374; Burch v. Breckenridge, 16 B. Mon. 482; Coleman v. Walley, 16 B. Mon. 329; Jarman v. Wilkenson, 7 B. Mon. 393; Song v. White, 5 J. J. Marsh. 226; Sweeney v. Smith, 15 B. Mon. 325. Louisiana.—See Barbet v. Roth, 16 La. Ann. 271; Maryland.—Early cases held the American rule, Farr v. Williams, 4 Md. Ch. 68; Miller v. Williams, 5 Md. 219; But late cases hold the English rule, Cooke v. Hasbands, 11 Md. 492; Hall v. Eccleston, 37 Md. 520. Massachusetts follows New York.—Willard v. Eastham, 15 Gray 328; Rogers v. Ward, 8 Allen 387; Tracy v. Keith, 11 Allen 214; Allen v. Fuller, 117 Mass. 402. Michigan.—Powers v. Russell, 26 Mich. 179; Rankin v. West, 25 Mich. 195; De Vries v. Conklin,

Prior to the statutory enactments in this country on this subject, there were these two well-defined rules—one the opposite of the other, but were confined to the Middle and most of the Southern States; the New England and Western States having no general equity jurisprudence, and in the States originally governed by French or Spanish laws the community system existed.

Legislation was slow and experimental, the first step being to empower a married woman, when deserted by her husband, to contract, sue, and be sued as if unmarried.¹⁹ In 1848, the legislation of New York and Pennsylvania revolutionized the system providing that the property which a married woman held before marriage and such as she may obtain during marriage should be her sole and separate property. From this time onward the tendency of legislation is to make a married woman a *feme sole* as to her contracts with the remedy against her property, and a *feme sole quoad* the capacity to enjoy and dispose of her separate estate.

These statutes can be classified into (1), statutes which make the wife the owner at law, of the property she had before and acquired during marriage, instead of letting it

pass to the husband by the rules of the common law, (2) statutes which merely exempt the property from her husband's debts, contracts or obligations and (3) statutes which not only make her the owner at law of the property, but expressly empower her to contract and be contracted with at law as a *feme sole*.

To prevent the common law from taking effect the property would be settled upon her in trust for her sole and separate use, which would be effective and enforceable in courts of equity; and to abrogate the same common law rules the married women statutes were enacted.²⁰

The trust in equity and the statutes at law aim to accomplish the same object and results, the former by means of equity, the latter by means of the law, both creating a separate estate for the same purpose; the former when the parties voluntarily make the contract, the latter without an agreement, whenever the property exists.²¹ These statutes, therefore, abrogate the common law to the extent of the interests, rights and powers conferred by them, but they do not interfere or invade the equity doctrines for the reasons above given;²² hence it follows that the common law prevails except in so far as these statutes expressly or by necessary implication change it, or in other words, except in so far as removed by the statute; just the same as applied to the separate estate in equity, that the common law prevailed, except in so far as the trust gave to equity jurisdiction to change it; although it has been held that such construction should be given as will effectuate the intention of the legislature and the purpose of the act.²³ And

¹⁹ Snyder v. People, 26 Mich. 108; Phillips v. Grocer, 20 O. St. 881; Mitchell v. Otny, 28 Mich. 289; Todd v. Lee, 15 Wis. 380.

²¹ Blevens v. Buck, 26 Ala. 292; Calvin v. Currier, 22 Barb. 371; Clowson v. Clowson, 22 Ind. 239; Bank v. Williams, 46 Miss. 625; Yale v. Dederer, 18 N. Y. 265; Ballin v. Dillaye, 37 N. Y. 35; Peake v. LaBaw, 5 C. E. Green 282.

²² Brookings v. White, 49 Me. 479; Edwards v. Stevens, 3 Allen 315; Lard v. Parker, 3 Allen 129; Perkins v. Perkins, 62 Barb. 631; Hurd v. Cass, 9 Barb. 366; Berie v. Rampasher, 5 Duer 183; Mallet v. Parkham, 62 Miss. 922; Carly v. Dixon, 51 Miss. 669; Staton v. New, 49 Miss. 309; Whitworth v. Carter, 43 Miss. 72; Mahon v. Garmley, 24 Pa. St. 82; Diver v. Diver, 6 Smith 106; Eldridge v. Preble, 34 Me. 148; Smith v. Henry, 35 Miss. 369; Alverson v. Jones, 10 Cal. 9; Farrell v. Patterson, 43 Ill. 52; Stanton v. Kirch, 6 Wis. 338; Smith v. Hewett, 13 Iowa 94; Johnson v. Runyon, 21 Ind. 114; Stewart v. Bail, 33 Miss. 154.

²³ Power v. Lester, 17 How. Pr. 413; Goss v. Cahill,

22 Mich. 256; Dennison v. Gibson, 24 Mich. 187. Minnesota.—Pond v. Carpenter, 12 Minn. 432; Spencer v. R. R. Co., 22 Minn. 32; Sanford v. Johnson, 24 Minn. 172. Missouri.—Whiteside v. Cannon, 23 Mo. 457; Second v. Garland, 23 Mo. 547; Coats v. Robinson, 10 Mo. 757; Schafarish v. Amb, 46 Mo. 114; Clafflin v. Van Wagoner, 32 Mo. 252; Miller v. Brown, 47 Mo. 504; Kimm v. Wiepert, 46 Mo. 532; Lincoln v. Eowe, 51 Mo. 571; Bank v. Taylor, 62 Mo. 338; Whiteley v. Stewart, 63 Mo. 363; Gage v. Gates, 62 Mo. 417; Radgers v. The Bank, 69 Mo. 563; Gay v. Ihm, 69 Mo. 584; New Hampshire.—Hutchins v. Colby, 43 N. H. 139; Nims v. Bigelow, 45 N. H. 348; Vogt v. Ticknor, 48 N. H. 242; Batchelder v. Sargent, 47 N. H. 262. New Jersey.—Leacraft v. Hedden, 3 Green. 552; Johnson v. Cummins, 1 C. E. Green 194; Armstrong v. Ross, 5 C. E. Green 109; Perkins v. Elliot, 8 C. E. Green 526; Pentz v. Simonson, 2 Beas. 232; Oakley v. Pound, 1 McCarter 178. Ohio.—Hardy v. Van Harlingen, 7 Ohio St. 208; Phillips v. Graves, 20 Ohio St. 390; Armstrong v. Williams, 35 Ohio St. 286. Texas.—Milburn v. Walker, 11 Tex. 329. Vermont.—Patridge v. Stocker, 36 Vt. 117. Virginia.—West v. West, 3 Rand. 378; Vizonneau v. Pegram, 2 Leigh. 188; Williamson v. Beckham, 8 Leigh. 20; Leigh v. Bank U. S., 9 Leigh. 200; Whiteing v. Rust, 1 Gratt. 488; Ellis v. Baker, 1 Rand. 47; Woodson v. Perkins, 5 Gratt. 345; Nixon v. Rose, 12 Gratt. 431; Penn v. Whitehead, 17 Gratt. 503; Muller v. Bailey, 21 Gratt. 628; Burnett v. Hawke, 25 Gratt. 486; Darnall v. Smith, 26 Gratt. 878. West Virginia.—Radford v. Carville, 13 W. Va. 572. Wisconsin.—Todd v. Lee, 15 Wis. 380; 16 Wis. 484.

¹⁹ See Jackson v. Hubbard, 36 Conn. 10; Statute of Maine, 1821; of Tenn. in 1836; of Miss. in 1839; of Mich. 1844.

hence, too, such statutes do not unless they so provide, interfere with or operate on the relations, duties and responsibilities existing between husband and wife;²⁴ nor take from the husband his marital rights except as they pertain to her property; nor relieve him from responsibility, except as they relate to the wife's contracts and debts which bind her separate estate.²⁵

Under the third class of statutes, providing that a married woman may contract and sue and be sued at law, as a *feme sole*, she has the full power given and the reciprocal responsibilities; and hence the equity doctrines do not apply.²⁶ Under the second class of statutes, which merely exempts her property from her husband's debts, she has no power of contract or legal ownership. All other statutes merely give to the wife a separate estate at law instead of letting the property pass to the husband under the common law.²⁷ Hence the legal title vests in the wife, as a wife and not as a person *sui juris*, and does not invest her with the general power of contract;²⁸ nor with power to make per-

sonal contracts; but she can charge this legal separate estate, created by statute, to the same extent and for the same purposes that she could have charged in equity, her equitable separate estate created by instrument of trust,²⁹ for the reason, amongst others, that the statute does not interfere with the equity jurisdiction,³⁰ or change the status of marriage, except as to the husband's property interests³¹ or change the common law disability to contract except in so far as the statute expressly confers it.

As a married woman under such statutes, takes a separate estate at law it has been held by some courts that it logically follows that any act or contract which enables her to use, hold and enjoy such estate will bind that separate estate at law; or in other words, statutes which merely confers the right to hold and enjoy her property, instead of letting it pass to her husband under the common law, also confers the power to make at law such contracts and incur such obligations as are necessary to hold and enjoy such property enforceable at law, because such contracts are incident to the right conferred, and the grant of a thing carries with it every power necessary to make such grant effective.³²

42 Barb. 310; Bergey's Appeal, 10 Smith 408; Ratcliff v. Douglass, 24 Miss. 181; Lee v. Bennett, 31 Miss. 119; Whitworth v. Carter, 43 Miss. 61; Huff v. Wright, 39 Ga. 43; Stone v. Gazzam, 46 Ala. 275.

²⁴ Walker v. Reamy, 12 Casey 410; Schindell v. Schindell, 12 Md. 108; Cole v. Van Riper, 44 Ill. 58; Dunning v. Pike, 46 Me. 461.

²⁵ Pippen v. Wesson, 74 N. C. 442; Davis v. Bank, 5 Neb. 247; Pond v. Carpenter, 12 Minn. 482; Wooster v. Northrup, 5 Wis. 131; Snyder v. People, 26 Mich. 108; Phillips v. Graves, 20 O. St. 381; Mitchell v. Orey, 23 Miss. 239.

²⁶ Willard v. Eastham, 15 Gray 328; Rogers v. Ward, 8 Allen 387; Durfee v. McClurg, 6 Mich. 222; Duren v. Getchell, 55 Me. 241; Emerson v. Clayton, 32 Ill. 493; Cookson v. Toole, 59 Ill. 513; Alvin v. Lard, 39 N. H. 196; Batchelder v. Sargent, 47 N. H. 262; Bailey v. Pearson, 9 Fost. 77; Hammond v. Corbett, 50 N. H. 501; Eckert v. Reuter, 4 Vroom 266; Long v. Long, 1 McCarter 482; Tillman v. Shackelton, 15 Mich. 447; Beard v. Rudolph, 29 Wis. 138; Dodge v. Silverthorn, 12 Wis. 644; Farr v. Sherman, 11 Mich. 33; DeVries v. Conklin, 22 Mich. 253.

²⁷ Johnson v. Cummins, 1 C. E. Green 97; Leonard v. Rogan, 20 Wis. 540; Barton v. Bear, 35 Barb. 78; Cookson v. Toole, 59 Ill. 518; Bradford v. Greenway, 17 Ala. 797.

²⁸ Jones v. Crossthwait, 17 Iowa 393; McKee v. Reynolds, 26 Iowa 578; Johnson v. Rugg, 18 Iowa 187; Wolf v. Van Metre, 19 Iowa 124; Tracy v. Keith, 11 Allen 214; Lard v. Parker, 3 Allen, 127; Hovey v. Smith, 22 Mich. 170; Albin v. Lord, 39 N. H. 196; Ames v. Foster, 42 N. H. 381; Marvis v. Palmer, 32 Miss. 278; Pallen v. James 45 Miss. 129; Stephenson v. Asburne, 41 Miss. 119; Whitworth v. Carter, 43 Miss. 679; Davis v. Foy, 7 Am. & M. 64; Pond v. Carpenter, 12 Minn. 480; Kavanaugh v. Brown, 1 Fox. 481; Wooster v. Northrup, 5 Wis. 245; Yale v. Dederer, 22 N. Y. 450; Owen v. Cawley, 36 N. Y. 600;

Robinson v. Rivers, 9 Abb. Pr. 144; Parker v. Lambert, 31 Ala. 89; Alexander v. Saulsbury, 37 Ala. 375; Riel v. Overall, 39 Ala. 138; Eckert v. Reuter, 4 Vroom 266; Bauer v. Bauer, 40 Mo. 61; Morgan v. Audriatt, 2 Hilton 431; Switzer v. Valentine, 4 Duer. 96; Glyde v. Keister, 1 Grant 469; Glass v. Warwick, 4 Wright 140; Caldwell v. Walters, 6 Harris 79; O'Dalley v. Morris, 31 Ind. 111; Stevens v. Parish, 29 Ind. 260; Coate v. McKee, 26 Ind. 223.

²⁹ Todd v. Lee, 15 Wis. 365; 16 Wis. 480; Johnson v. Cummins, 1 C. E. Green 97; Yale v. Dederer, 18 N. Y. 465; Ballin v. Dillaye, 57 N. Y. 35; Albin v. Lord, 39 N. H. 196; Peake v. La Baw, 6 C. E. Green 269; Murray v. Koyes, 11 Casey 384; Mahon v. Gormley, 12 Harris 80; Barnett v. Lichtenstein, 39 Barb. 194; Kimm v. Weippert, 46 Mo. 332; Hooper v. Smith, 23 Ala. 639; Calvin v. Currier, 22 Barb. 371; Wicks v. Mitchell, 9 Kas. 89; Perkins v. Elliott, 8 C. E. Green 526; Smith v. Howe, 31 Ind. 233; Johnson v. Tutewiler, 35 Ind. 353; Patton v. King, 26 Tex. 685.

³⁰ Johnson v. Cummins, 1 C. E. Green 97; Leonard v. Rogan, 20 Wis. 540; Barton v. Bear, 35 Barb. 78; Cookson v. Toole, 59 Ill. 515.

³¹ Walker v. Reamy, 12 Casey 410; Schindell v. Schindell, 12 Md. 108; Cole v. Van Riper, 44 Ill. 58; Dunning v. Pike, 46 Me. 461; McLaran v. Hall, 26 Iowa 297; Peake v. La Baw, 6 C. E. Green 269; Armstrong v. Ross, 5 C. E. Green 199.

³² Selph v. Howland, 23 Miss. 269; Robertson v. Bruwer, 24 Miss. 244; Armstrong v. Stovall, 26 Miss. 280; Ingoldsby v. Juan, 12 Cal. 576; MacLay v. Love, 25 Cal. 381; Bodley v. Ferguson, 30 Cal. 518; Carpenter v. Mitchell, 50 Ill. 478; Wilkinson v. Cheatham, 45 Ala. 341; Burley v. Pearson, 9 Foster 87;

But the weight of authority³³ is against this position for the reason, (1) this is not the purpose of the statute; (2) the power to bind the estate comes by implication from the equity doctrine but the power to control does not; (3) the disability at common law remains unless removed by the statute.

It therefore follows that a married woman can bind her legal separate estate—the separate estate created by statute—by the same contracts and to the same extent that the equitable separate estate could formerly have been charged in equity; hence, in those States where the English principle prevails the rule is that unless restrained by the statute a married woman has the full capacity to contract with respect to her separate estate; and in those States where the American doctrine is adopted, the rule is that unless the statute expressly or by necessary implication confers the power to contract, a married woman, having a separate estate under the statute, has no power to make contract but such as are given by the statutes.

Under both of these rules, contracts necessary and proper to enable a married woman to hold and enjoy her separate estate such as contracts for needed improvements or repairs,³⁴ contracts beneficial and necessary for

the estate,³⁵ and in some cases contracts where the benefit inures to herself or to the estate³⁶ are valid and binding.

In the States following the English doctrine a married woman's contracts and obligations made, not on the husband's account, nor by her as his agent, but on her own account with respect to her separate estate, so as to make the estate the debtor will bind such separate estate enforceable in equity; hence a specific charge such as a mortgage or lien will be binding,³⁷ and when she has expressly charged the payment of the obligation on the estate,³⁸ and for her bond, bill, note, or written obligation,³⁹ and any contract made

estate or the improvement. *Sherman v. Elder*, 23 N. Y. 381; *Knapp v. Smith*, 27 N. Y. 518; *Musser v. Gardner*, 16 P. F. Smith 242; *Lewis v. Johns*, 24 Cal. 98; *Conway v. Smith*, 13 Wis. 125; *Fowler v. Seaman*, 40 N. Y. 592; *Johnson v. Tatweiler*, 35 Ind. 353.

³⁶ *Frazier v. Brownlow*, 3 Ire. Eq. 237; *Gardner v. Gardner*, 22 Wend. 526; *Franklin v. Beatty*, 27 Miss. 347; *Burr v. Swan*, 118 Mass. 588; *Verrill v. Parker*, 65 Me. 578; *Major v. Symmes*, 19 Ind. 117; *Owen v. Cawley*, 42 Barb. 166; *Milburn v. Walker*, 11 Tex. 329; *Allen v. Fuller*, 118 Mass. 402; *Nash v. Mitchell*, 8 Hun. 471; *Spencer v. Humiston*, 9 Hun. 71; *Moore v. McMillan*, 23 Ind. 78; *Morse v. Mason*, 103 Mass. 560; *Packer v. Kane*, 4 Allen 346.

³⁷ *James v. Crossthwait*, 17 Iowa 397; *Taylor v. Shelton*, 30 Conn. 122; *Carter v. Howard*, 39 Vt. 106; *Werser v. Lowenthal*, 31 Md. 413; *Owen v. Cawley*, 36 N. Y. 600; *Leonard v. Rogers*, 20 Wis. 520; *Craft v. Rolland*, 37 Conn. 491; *Kelly on Contract Married Women*, 269 cases cited.

³⁸ *Black v. Galway*, 12 Harris 78; *Bartlett v. Bartlett*, 4 Allen 440; *Patton v. Kinsman*, 17 Iowa 428; *Wolfe v. Van Metre*, 19 Iowa 136; *Watson v. Thurber*, 11 Mich. 457; *Ellis v. Kenyon*, 25 Ind. 134; *Pomeroy v. Ins. Co.* 40 Ill. 398; *Wilson v. Brown*, 2 Beas. 277; *Peake v. La Baw*, 6 C. E. Green 282; *Pemberton v. Johnson*, 46 Miss. 342; *Carpenter v. Mitchell*, 50 Ill. 47; *Fiske v. McIntosh*, 101 Mass. 66; *Todd v. R. R.*, 19 O. St. 514; *Beals v. Cobb*, 51 Me. 348; *Hartman v. Ogborn*, 54 Pa. St. 120.

³⁹ *Athol v. Machine Co.* 107 Mass. 437; *Hanse v. Dewitt*, 63 Barb. 53; *Nunn v. Givham* 45 Ala. 370; *Ins. Co. v. Babcock*, 42 N. Y. 613; *Todd v. Ames*, 60 Barb. 454; *Sharter v. Nelson*, 4 Lans. 114; *Perkins v. Elliott*, 8 C. E. Green 526; *Kelso v. Taber*, 52 Barb. 109; *Coates v. McKee*, 26 Ind. 233; *Manchester v. Sahler*, 47 Barb. 155; *Cherry v. Clements*, 16 Humph. 552; *Felton v. Reid*, 17 Jones N. C. 269; *Bartlett v. Bartlett*, 4 Allen 540; *Hobhouse v. Hobhouse*, 8 Bush 665; *Clarke v. Valentine*, 41 Ga. 143; *Bibb v. Pope*, 43 Ala. 190; *Foxworth v. Magee*, 44 Miss. 430.

⁴⁰ *Whitesides v. Cannon*, 28 Mo. 457; *Segond v. Garland*, 23 Mo. 547; *Cowles v. Morgan*, 34 Ala. 535; *Dobbinson v. Hubbard*, 17 Ark. 189; *Bell v. Keller*, 13 B. Mon. 391; *Caldwell v. Sawyer*, 30 Ala. 283; *Azley v. Ikelheimer*, 26 Ala. 332; *Huff v. Wight*, 39 Ga. 41; *Schofarth v. Amba*, 46 Miss. 114; *Jarmon v. Wilkinson*, 7 B. Mon. 293; *Owen v. Cawley*, 36 N. Y. 600; *Bonn v. Wappert*, 46 Mo. 532; *Parker v. Simonds*, 1 Allen 258; *Ballin v. Dillage*, 37 N. Y. 35; *Shannon v. Canney*, 44 N. H. 592; *Yale v. Dederer*, 18 N. Y. 265; *Wolff v. Van Metre*, 19 Iowa 134; *Sawyer v. Fennold*, 59 Me. 500; *DeVries v. Conklin*, 22 Mich. 255;

West v. Laraway, 28 Mich. 465; *Scott v. Scott*, 13 Ind. 227; *Reese v. Cochran*, 10 Ind. 196; *Patten v. Patten*, 75 Ill. 449; *Douglas v. Gausman*, 68 Ill. 172; *Huls v. Buntin*, 47 Ill. 396; *Southard v. Plummer*, 36 Me. 64; *Williams v. McGrade*, 13 Minn. 46; *Conway v. Smith*, 13 Wis. 131.

⁴¹ See opinion of Chancellor Green in *Johnson v. Cummins*, 1 C. E. Green 97; *Peake v. La Baw*, 6 C. E. Green, 269; *Armstrong v. Ross*, 5 C. E. Green, 109; *Yale v. Dederer*, 18 N. Y. 272; *Davis v. Millett*, 34 Me. 429; *Ayer v. Warren*, 47 Me. 217; *Lee v. Lanhau*, 59 Me. 478; *Cookson v. Toole*, 59 Ill. 515; *Todd v. Lee*, 15 Wis. 385; *Albin v. Lord*, 39 N. H. 196; *Batchelder v. Sargent*, 47 N. H. 262; *Emerson v. Clayton*, 32 Ill. 493; *Durfee v. McClung*, 6 Mich. 223; *Duren v. Getshell*, 55 Me. 241; *Albin v. Lord*, 39 N. H. 196; *Emerson v. Clayton*, 32 Ill. 493; *Eckert v. Reuten*, 4 Vroom 266; *Long v. Long*, 1 McCarter 462; *Leonard v. Rogan*, 20 Wis. 540; *Kelly on Cont., Married Woman* 268 and cases cited.

⁴² *Wells v. Thorman*, 37 Conn. 318; *Fairbanks v. Mothersell*, 60 Barb. 406; *Withers v. Sparrow*, 66 N. C. 129; *Falkner v. Colshear*, 39 Ind. 201; *Copp v. Stewart*, 38 Ind. 479; *Lindley v. Cross*, 31 Ind. 106; *Morse v. Mason*, 103 Mass. 590; *Ainsley v. Mead*, 3 Lans. 116; *Robinson v. Hoffman*, 15 B. Mon. 80; *Hughes v. Peters*, 1 Cold. 67; *Felter v. Wilson*, 13 B. Mon. 96; *Finley's Appeal*, 17 P. F. Smith 453; *Woodward v. Wilson*, 18 P. F. Smith 208; *Corning v. Lewis*, 36 How. 425; *Matter v. Lillie*, 24 How. 264; *Lyman v. Cessford*, 15 Iowa 229; *Bar's Appeal*, 5 Smith 336. And if the improvement results from the voluntary labor of the husband his creditors cannot touch

with respect to the estate so as to make the estate the debtor, and whether such is the fact or not depends upon the facts and circumstances of each particular case.⁴⁰ Hence her contracts are valid when they are express or implied charges on the estate such as specific charges, mortgage or lien, and when she by express words charges the contract or obligation on the estate; implied, when she does not expressly charge the estate, but the facts show that she contracted so as to make the estate the debtor, such as her note or other written obligation, and such contracts as inure to the benefit of the estate. From this came the doctrine of intention. Between the rule heretofore given and the doctrine of intention there is no difference but in the reason for holding the implied charge binding; the former holding, that the reason is as has been stated; the latter that the reason is her implied intention; yet under both, such contracts, namely, her note, or written obligation for the benefit of the estate are held binding except perhaps in one or two instances.⁴¹

Alabama,⁴² Arkansas,⁴³ Connecticut,⁴⁴ Iowa,⁴⁵ Kansas,⁴⁶ Illinois,⁴⁷ Kentucky,⁴⁸ Maryland,⁴⁹ Missouri,⁵⁰ Ohio,⁵¹ Wisconsin,⁵² follow the doctrine of implied and express intention and consequently the English rule heretofore given. In California the adjudications seem to indicate that to bind the es-

tate her contract must be a specific charge, or in the nature of a specific charge, yet the cases can be placed upon the English doctrine and may ultimately be placed there.⁵³

In Indiana the intention to charge must be expressly declared.⁵⁴ In New York it was held that the intention to charge must be declared in the contract itself or the consideration must be for the direct benefit of the estate.⁵⁵ Subsequently this was extended to contracts made on the credit of the estate for its use and benefit;⁵⁶ hence the English rule is applicable. The same doctrine exists in Massachusetts,⁵⁷ Maine⁵⁸ and New Jersey,⁵⁹ but in Pennsylvania a married woman has no power but such as is granted by the statute or the trust, hence the American rule is in this State the doctrine.⁶⁰

JOHN F. KELLY.

Bellaire, Ohio.

⁵³ *Maclay v. Love*, 25 Cal. 382.

⁵⁴ *Kantrowitz v. Prather*, 31 Ind. 105; *Hodson v. Davis*, 43 Ind. 256; *Shannon v. Bartholomew*, 55, Ind. 54 Ind.

⁵⁵ *Yale v. Dederer*, 22 N. Y. 450; *Ins. Co. v. Babcock*, 42 N. Y. 613; *Manhattan Co. v. Thompson*, 58 N. Y. 84; *Baker v. Lamb*, 11 Hun. 520.

⁵⁶ *Maxon v. Scott*, 55 N. Y. 247; *Bank v. Miller*, 63 N. Y. 639; *Rohrbach v. Ins. Co.* 62 N. Y. 47.

⁵⁷ *Brown v. Swann*, 118 Mass. 588.

⁵⁸ *Verrill v. Parker*, 65 Me. 578.

⁵⁹ *Pentz v. Simonson*, 2 Beas. 232; *Armstrong v. Ross*, 5 C. E. Green 109.

⁶⁰ *Darrance v. Scott*, 3 Whart 309; *Shark v. Brown*, 11 P. F. Smith 320; *Bruner's Appeal* 11 Wright 27; *Bear v. Bear*, 9 Casey 525.

Bailey v. Pearson, 9 Foster 77; *Kelly Cont. Married Women*, 272 and cases cited.

⁴⁰ *Johnson v. Cummins*, 1 C. E. Green 97; *Burke v. Cole*, 97 Mass. 113; *Conn v. Conn*, 1 Md. Ch. 212; *Koontz v. Nabb*, 16 Md. 549; *Oakley v. Pound*, 1 McCarter, 178; *Blake v. Hall*, 57 N. H. 373; *Stillwell v. Adams* 29 Ark 350; *Miller v. Brown* 47 Mo. 504; *Conway v. Smith*, 13 Wis. 131; *Pentz v. Simonson*, 2 Beas. 232; *Grapengather v. Fejervary*, 9 Iowa 163; *Rogers v. Ward*, 9 Allen 387; *Mayo v. Hutchinson*, 57 Me. 346; *McFadden v. Crumpler*, 20 Tex 374; *Larabee v. Colby*, 99 Mass. 559; *Davidson v. McCandlish*, 69 Pa. St. 169; *Campbell v. White*, 22 Mich. 173; *Craft v. Rolland*, 37 Conn. 491; *Lee v. Morris*, 3 Bush. 210.

⁴¹ *Indiana and California*.

⁴² *Nunn v. Girhan*, 45 Ala. 373; *Short v. Battle*, 52 Ala. 456.

⁴³ *Dobbin v. Hubbard*, 17 Ark. 189; *Palmer v. Rankin*, 30 Ark. 771.

⁴⁴ *Wells v. Thorman*, 37 Conn. 318.

⁴⁵ *McCormack v. Halbrook*, 22 Iowa 457.

⁴⁶ *Krage v. Mastin*, 9 Kan. 547.

⁴⁷ *Furness v. McGowan*, 78 Ill. 338.

⁴⁸ *Sillard v. Turner*, 16 B. Mon. 376; *Williamson v. Williamson*, 18 B. Mon. 385.

⁴⁹ *Hale v. Eccleston*, 37 Md. 510.

⁵⁰ *Whiteley v. Stewart*, 63 Mo. 363.

⁵¹ *Williams v. Armiston*, 35 O. St. 296.

⁵² *Todd v. Lee*, 15 Wis. 380.

CONTRACTS ON UNREAD CONDITIONS.

Unquestionable as is the general principle, so strongly affirmed by the late Sir George Jessel in the recent case of *Wallis v. Smith*,¹ that courts of law should insist on the maintenance of contracts, deliberately entered into between adults at arm's length, according to their clearly expressed intention, there is a class of cases in which the element of deliberacy is so slightly present, if not wholly absent, that the parties are rightly absolved from performance. In this class of cases are to be included those which come within the exceptions to the general rule that, where a document in a common form, stating the terms by which the person delivering it will

¹ 21 Ch. D. 243.

enter into a proposed contract, is tendered by one party, thereby constituting it his offer, the other party to whom it is so tendered is presumed to assent to its terms, if he accepts it without objection, that act amounting to an adoption of the offer whether he reads the document or otherwise informs himself of its contents or not. One such exception is where the law makes a contract for the parties. At least, so we would deduce from the decision in *Henderson v. Stephenson*,² although that exception was not acknowledged in *Burke v. S. E. Ry. Co.*,³ and has not been adverted to in the recent case of *Watkins v. Rymill*,⁴ where Stephen, J., thus formulates several other exceptions (though they do not seem to us to have been precisely laid down in the previous authorities):—“(i) In the first place, the nature of the transaction may be such that the person accepting the document may suppose, not unreasonably, that the document contains no terms at all, but is a mere acknowledgement of an agreement not intended to be varied by special terms. Some illustrations of this exception are to be found in the judgments in *Parker v. S. E. Ry. Co.*,⁵ and in the language of some of the Lords in *Henderson v. Stephenson*, though these must be received with caution, for reasons given by Lord Blackburn in his judgment in *Harris v. G. W. Ry. Co.*⁶ (ii.) A second exception would be the case of fraud, as, if the conditions were printed in such a manner as to mislead the person accepting the document. (iii.) A third exception occurs, if, without being fraudulent, the document is misleading, and does actually mislead the person who has taken it. The case of *Henderson v. Stephenson*, is an illustration of this. (iv.) An exception has been suggested of conditions unreasonable in themselves, or irrelevant to the main purpose of the contract. Lord Bramwell suggests some illustrations of this in his judgments in *Parker v. S. E. Ry. Co.*, One in the case of a ticket having on it a condition that the goods deposited in a cloak-room should become the absolute property of the railway if not removed in two days.”

² L. R. 2 H. L. 470.

³ 5 C. P. D. 1.

⁴ 10 Q. B. D. 178; 52 L. J. Q. B. 121.

⁵ 2 C. P. D. 416.

⁶ 1 Q. B. D. 515.

Now, in *Watkins v. Rymill*,⁷ the facts appearing were as follows:—The plaintiff left a waggonette to be sold at the defendant's repository, on commission, and thereupon received a receipt, containing the words “subject to the conditions as exhibited on the premises,” one of which conditions was that, on the lapse of a month, property might be sold by auction, without notice to the owner, unless the charges were paid. The plaintiff did not read the receipt, but put it in his pocket without noticing it; and the question was whether he was, nevertheless bound by the conditions exhibited on the premises. The case, said Stephen, J., “is obviously within the general rule—can it be brought under any of the exceptions? The only one which can apply to it is the one which we have put first. Can it be said that the nature of the transaction was such that the plaintiff might suppose, not unreasonably, that the document contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms? It seems to us impossible that this can have been the case. The acceptance of a carriage for sale on commission is not a simple contract, the terms of which are established by the common law in the absence of any special agreement by the parties. They must, from the nature of the case, be as special as those of a contract of lease, or a bill of lading, and this consideration alone seems to us to establish the conclusion that the receipt and the conditions to which it refers constituted the contract between the parties, and that the learned Common Sergeant misdirected the jury when he told them that the question was, whether the defendant had given reasonable notice to the plaintiff of the conditions. We may observe that in no view of the case could this direction be upheld. If any question at all were asked it ought to have been, whether the defendant took reasonable means to give notice of the conditions to the plaintiff, which is a very different one from that which was actually put to the jury. That was the question suggested by Mellish, L. J., in *Harris v. G. W. Ry. Co.*,⁸ and, added Stephen, J., “may be proper in cases falling under what we have called the first exception to what we apprehend to be the general rule; but this,

⁷ *Ubi supra*.

⁸ *Ubi supra*.

in our judgment, is not one of those cases. It resembles rather the case of *Zunz v. S. E. Ry. Co.*,⁹ and *Burke v. S. E. Ry. Co.*,¹⁰ in which the ticket itself was held to be the contract." And in the result a verdict was entered for the defendant, the plaintiff, who had not complied with the condition, being held bound by it, so that he was not entitled to recover in the action brought for his wagonette.

All the previous cases, indeed, with the exception of *Henderson v. Stephenson*, resulted in a like manner, holding the parties bound by the terms of the documents accepted; but *Watkins v. Rymill* carries even *Parker v. S. E. Ry. Co.* rather further, in holding that, although the jury had found for the plaintiff, judgment should be entered for the defendant, on the ground that the question, which in a certain sense was one of fact, could, according to law, be only answered in one way, and was therefore tantamount to a mere question of law. The judgment of Stephen, J., presents an elaborate and very valuable review of the previous authorities, and will repay careful perusal. And perhaps more useful to readers than anything further we could add, may be the following extract from the *Law Journal*, in commenting on *Watkins v. Rymill*:—"Henderson v. Stephenson was an action by a passenger by steamboat who received a ticket on the face of which were the words 'Dublin to Whitehaven.' On the back was the condition excluding liability for loss of luggage, on which the company relied; but the House of Lords held that the passenger was not bound by the condition. Mr. Justice Stephen points out that this was a case in which the defendant was attempting to get rid of a common law liability by an unusual condition, and in a manner unexpected by the passenger. Mr. Justice Stephen guardedly says that this case, 'although not inconsistent with *Zunz v. The South Eastern Company* shows that it cannot be regarded as a complete statement of the law.' The only ground on which *Zunz's* case and *Henderson's* case can be reconciled, is that in *Zunz's* case the condition exempted the company from liability off their own line. But a common carrier, who holds himself out to carry from London to Paris, is a common carrier for the

whole journey. In the cloak-room cases there was no common law liability. The same criticism applies to *Burke v. The South Eastern Railway Company*,¹¹ in which case the plaintiff's ticket contained the words, 'cheap return ticket—London to Paris and back, second class,' without any reference to the inside of the cover, which contained the condition limiting the responsibility of the defendants to their own trains. *Zunz's* case was decided before *Henderson v. Stephenson*, and *Burke's* case after it. Mr. Justice Stephen says that the judgment in *Burke's* case 'can hardly be supported by any principle short of that laid down in *Zunz's* case.' Moreover, it is difficult to reconcile either of them with *Henderson's* case. It might be supposed that the case in the House of Lords went further than merely overruling *Zunz's* case, and that it laid a new principle. Lawyers, perhaps, are apt to give too much weight to decisions of the House of Lords. Cases not infrequently come before that tribunal which involve the merest questions of fact, and have no law at all in them. This was the view taken of *Henderson v. Stephenson* by Lord Cairns, who, in delivering his opinion, said:—"It is a question simply of common sense." The conflict, more apparent than real, between *Henderson v. Stephenson* and the other cases is not a conflict of principles, but of facts. It is not a conflict of quality with quantity; but the House of Lords' case is only one of a series of cases to which the same principle applies, but in some of which, such as the cases of *Zunz* and *Burke*; it may have been wrongly applied. The difficulty of the subject arises to a large extent from the fact that the House of Lords' case, as so happens, deals with an exception to a general rule, and not with the rule itself. If this is not so, all the cases since the decision in the House of Lords, including the present, have been wrongly decided. A general rule very different from that laid down by Mr. Justice Stephen, may it is true, be extracted from the House of Lords' case. It may be argued with some ingenuity that the House of Lords intended to lay down the rule that no unsigned document is binding as a contract unless it is distinctly brought to the knowledge of both parties. Such a rule would be most inconvenient."

⁹ L. R. 4 Q. B. 539.

¹⁰ *Ubi supra*.

¹¹ 49 L. J. C. P. 107.

The prevailing doctrine, however, is not without its inconveniences also, as was experienced by the plaintiff in *Terrell v. Southend Local Board et al.*, reported in the *Times* of last Monday. The action, which was tried before Mathew, J., and a jury, was brought by a barrister, claiming damages "for his forcible detainer and imprisonment" upon the defendants' pier, whereby "he was compelled to pay the sum of 1 d., and suffered inconvenience and damage." He had gone on the pier, having paid the toll (1d.), and when returning was detained by the toll-keeper until he should either produce his ticket or pay the toll. He could not produce the ticket, but paid the 1d under protest. It appeared that the condition printed on the ticket required the holder to show it when leaving the pier. On cross examination by Mr. Murphy, Q. C., the plaintiff said he was not sure whether he received a ticket on paying his toll, nor did he know the case of *Watkins v. Rymill*; whereupon Mr. Murphy naturally observed that he should not have thought that any barrister would have commenced proceedings of this kind without looking at that case. And suffice it to add that the result was such as to show that time will not have been thrown away, when spent in acquiring a better acquaintance with that decision. — *Irish Law Times*.

ATTORNEY AND CLIENT—SUIT FOR FEES —QUANTUM OF RECOVERY.

HAISH V. PAYSON.

Supreme Court of Illinois, May 10, 1883.

1. It is not admissible in a suit for attorneys' fees to go into an inquiry concerning prospective benefits, which might arise in the future to the client from a settlement effected by his attorneys, in determining the value of their services.

2. The "result" of a litigation may be shown, but the word "result" thus used means whether successful or otherwise, and not the ultimate benefits to the clients; the inquiry is, not what benefits, immediate or remote, have been derived from the legal services, but what is the general worth of the services rendered.

SHELDON, J., delivered the opinion of the court:

The mode of presentation of this case to the jury was such as, in our opinion, to require a reversal of the judgment. The evidence which

was permitted to be given, and the so-called hypothetical question which was allowed to be put and read over to witnesses were calculated to draw away from the minds of the jury the true inquiry, what was the extent and value of the professional services rendered the defendant by the plaintiff, to the contemplation of the large sums of money which would result in the future from the saving of royalty, which, in the fourteen years would reach the enormous amount of \$1,120,000, suggestive of the idea to the jury that the plaintiff ought to be admitted to a participation of such magnificent gains.

While the amount involved might not improperly be considered in fixing the value of the plaintiff's services, yet we consider it not admissible to go into an inquiry concerning prospective benefits which might arise in the future.

Testifying to the amount of the benefits which would be realized by the defendant in the future, is not the statement of the fact, but the giving of an opinion. In the present case opinions may be received as to the value of the services, but opinions as to benefits in the future are not admissible. A citation is made of the rule as laid down in *Eggleston v. Boardman*, 37 Mich. 18, that the professional skill and standing of the person employed, his experience, the nature of the controversy, both in regard to the amount involved and the character and nature of the questions raised in the case, as well as the result, should all be taken into consideration in fixing the value of the services rendered. And it is claimed that what was here done was justified under the above authority as showing the result.

The word "result" thus used we understand to mean the termination of the controversy, whether successful or otherwise, and not the ultimate benefit to the client. As remarked in *Robbins v. Harvey*, 5 Conn. 341, the inquiry under a *quantum meruit* is not what benefits, immediate or remote, have been derived from the services, but the question is, what is the general worth of the services rendered. The objection is not that the amount involved might not be taken into consideration, but the mischief of the course pursued was that it was calculated to mislead the jury to think that the ultimate benefits to be derived by the defendant was a measure of compensation.

Another objection to the mode of the presentation of the case was in offering to the view of the jury the settlements which had been made with other persons. This was done by the evidence and by the question objected to. The idea was held out to the jury that the settlement got by the defendant was a much more favorable one than those made by others, and that was an advantage obtained by the defendant which should be considered by the jury. The question remarks upon the "important differences" between the settlements as an advantage to the defendant, and upon the price which "had to be paid by the regular licensees under the patents." Comparison of the settlement which the defendant made with

settlements which other people might have made, should not have been admitted. And this, if not done directly, was at least, in an indirect manner, brought before the jury. The above question read to witnesses was a compound of positive assertion of facts and conclusions.

It is said the question is a hypothetical one, and that in such a question it is allowable to assume facts. But it is not permissible to assume what is not within the range of legitimate evidence. The sum of \$1,200,000 as future benefits is a conclusion which the question figures out by inference from alleged facts. Evidence is to be given only of facts.

The inference and conclusions which the question contains, a witness would not be admitted to testify to. The hypothetical feature of the question is hardly discernable. The question covers some two and one-half pages, containing in it no appearance of hypothesis until in the last sentence in the words "on this supposed state of facts." The reading over of this lengthy paper filled with partial statements of facts containing conclusions drawn from them, many times in the hearing of the jury, was calculated to possess them most fully with the plaintiff's side of the case, and not leave their minds open to an unbiased consideration of the whole of the facts of the case. Opportunity should not be given for doing this through the medium of a question put to witnesses.

The question is an anomaly and must receive condemnation. For the errors indicated the judgment of the appellate court will be reversed and the cause remanded for further proceedings.

Judgment reversed.

NEGLIGENCE—DAMAGES—DELAY IN THE DELIVERY OF A TELEGRAM

GULF, ETC. R. CO. v. LEVY.

Supreme Court of Texas, Austin Term, 1883.

An action for negligence in failing to deliver a telegram can not be sustained by proof of mental suffering alone.

Appeal from Milam County.

STAYTON, J., delivered the opinion of the court:

The statement of this case as made by brief for appellant, which is admitted by the appellees to be correct, is as follows: The plaintiff alleged, in substance, that appellee resided in Cameron in Milam County; that appellant operated a telegraph line from said town to the town of Cleburne, in Johnson County, transmitting telegrams for hire; that in September, 1882, appellee's son, I. T. Levy, and Bettie Levy, the wife of I. T. Levy, were in said Johnson County, nine miles from said town of Cleburne; that on said day Bet-

tie Levy was taken violently sick and gave birth to a child, and that the child died on the day of September, 1882; that appellee's son was among strangers, without money and in desperate need of assistance and help from appellee, and that immediately upon the death of his child he went to Cleburne, and about nine or ten o'clock a. m. of October 1, 1882, delivered a telegram to appellant, paying the charges thereon, and informing it of the importance of its prompt transmission and delivery. The following is a copy of said telegram: "Cleburne, October 1, 1882. To I. Levy, Cameron, Texas: Betty and baby died. Come to Cleburne, to-night train, to my help. Wade meet you. Tell her mother. I. T. Levy." That the transmission and delivery of said telegram was a work of great necessity and charity; that appellant undertook to deliver the same in a reasonable time, but negligently failed to deliver the same until eleven o'clock of October 2, 1882; that by the delay in the delivery of such telegram appellee was prevented from going to the assistance of his son and from supplying him with money; that by reason of such delay his son was followed up and harrassed by his creditors for the expenses of the funeral of his wife and child, and had to sell his property at a great sacrifice, and was compelled to borrow money from strangers, and was deprived of the presence of his father and mother in his sore trial, and was compelled, a stranger in a strange land, to be the only mourner at his wife and child's funeral; that appellee has suffered the keenest disappointment and sorest grief at being deprived of the privilege of being present at the burial of his daughter-in-law and grand-child, of relieving his son of his wants, of sympathizing with him in his sad bereavement and trial, and been damaged in his feelings and otherwise in the sum of \$5,000.

It will appear from the calendar that October 1, 1882, the day on which said telegram was delivered to appellant, was Sunday.

Appellant specially excepted to the petition as follows: 1st, because the petition does not show that plaintiff has sustained any damage; 2d, because the matters stated in the petition constitute no cause of action; 3d, because the petition shows that appellee is not entitled to recover; 4th, because the petition claimed damages for the non-delivery of a telegram on Sunday, which, under the laws of this State, appellant was forbidden to do. The demurrers to the petition were overruled, and that is assigned as error.

There was no allegation nor proof of any damage to the appellee, unless mental suffering alone constitutes such character of injury as will entitle a person to damages in an action based upon negligence. That a person may enforce a contract made by another for his benefit, although the consideration is paid by such other person, is true, but such is not the contract set up in the petition, or proved. Whatever contract was made by the son was made for the benefit of himself, with no intent that it should inure in any respect

to the benefit of the appellee. The contract between the son and the appellant, therefore, can not be considered as the basis of this action.

To sustain the action it must appear that the appellee has been injured in his person, property or reputation by the negligence of the appellant. It can not be pretended that in the latter two he has been injured in any respect, and the inquiry remains, has he been injured in his person in any respect as will entitle him to damages; to such pecuniary satisfaction as under the settled rules of law a plaintiff may obtain through an action?

No deprivation of any absolute right of person has been stated, which would entitle the appellee at least to nominal damages, and we have the naked question: Can a person who has not shown himself deprived of any absolute right for which damages, nominal at least, would be given, maintain an action for an injury to his feelings alone, which results solely from a breach of a contract to which he is not a party, made with and for the benefit of another; or from a tort through which such other person receives an injury, personal to himself, for which damages may be given. Recognizing the fact that by reason of the public character of the employment which the appellant has assumed, a duty existed upon its part to deliver the message to the appellee without unnecessary delay, and that a failure to perform such duty, if attended with damages to the appellee, gives sufficient ground for an action, even in the absence of a contract to which he is a party, it becomes necessary to inquire whether an injury to the feelings of the appellee, unconnected with some other ground for damage, is sufficient to maintain this action.

An act for which the law does not give damages, at least nominal, can not in a legal sense be called an injury, and it has therefore been truly said "it may be laid down as a true proposition, that base negligence, unproductive of damages to another, will not give a right of action. Negligence causing damage will do so."

In many cases where a bodily injury has been inflicted, even by negligence, the mental suffering resulting therefrom and necessarily incident thereto has been considered an element of damages, but we know of no case, unless it be the one hereafter to be referred to, in which it has been held sufficient in itself to maintain an action for damages, in the absence of some statute affecting the question.

In case of the death of an adult child, by the negligence of a corporation or person, who had assumed some duty to it which was violated by such neglect, in the absence of a statute authorizing it, no action could be maintained for such injury to the feelings of a parent, or other relative, and yet but few causes could be productive of deeper mental distress, and even in action under statutes permitting recovery in cases where death has resulted, no recovery can be had for mental suffering, unless the statute permits it in

terms or authorizes the recovery of exemplary damages. *Field on Damages*, 630.

This is upon the theory that no cause of action accrues to the parent, or other relative, unless given by the statute, and when thus given it will not extend to embrace elements of damages not given by the statute. The effect of the acts of the several States, and of the English acts, authorizing recovery, for the death of persons, is to remove the technical difficulty at common law, interposed to the maintenances of actions in such cases; and they certainly do not withdraw from any one any right which could have been asserted, as the law formerly stood, for an injury to the person bringing an action, grounded upon any reason personal to himself, and other than the pecuniary loss suffered by death.

Yet in actions under statutes of the several States, and under the English statutes, it has been uniformly held that the injury to the feelings of the person or persons entitled to maintain such action was not an element of damage which could be considered. This could not well be held, if it had ever been true, that an action could be maintained for an injury to feelings alone, which is a matter personal to the aggrieved party, for which an action would not have been denied upon the technical ground upon which recovery for the loss of a life was denied.

In cases of seduction no action is maintainable by the parent, guardian or master, upon the ground of injury to the feelings or mental distress, but the loss of services is made the basis of the suit, and if there was no such loss there could be no recovery, however great the mental suffering induced by the wrong.

The same principle applies to cases for criminal conversation. In cases for libel or slander, unless words used be such as in law are held to entitle the person against whom they are used to damages, at least nominal, special damages must be averred and proved or the action can not be maintained, and this without reference to the degree of mental distress, which may be inflicted by the language.

In all these classes of cases, where a pecuniary injury is shown, mental distress resulting from the same act which produced the pecuniary damages becomes an element in aggravation for which damages may be given.

The cases in which damages have been allowed for mental distress, resulting from injuries to persons, will be found to be cases in which the mental distress was the incident to a bodily injury suffered by the distressed person, or cases of injury to reputation or property, in which pecuniary damage was shown, or the act such that the law presumes some damage, however slight, from the act complained of, and not cases in which bodily injury or other wrong was suffered by one person and the mental distress by another; or where cases in which a direct pecuniary damage had been shown, and the element of mental distress had been admitted in aggravation of the in-

juries for the purpose of recovering damages other than such as are only compensatory.

The rule is thus stated in Wood's Mayne on Damages, 74 (1st Am. Ed.): "But we do not apprehend that the rule has any such force as to enable a person to maintain an action where the only injury is mental suffering, as might be thought, from a reading of the loose dicta and statements of the court in some of the cases. So far as I have been able to ascertain the force of the rule, the mental suffering referred to is that which grows out of the sense of peril, or the mental agony, at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action."

The following authorities bear upon the question: Canning v. Inhabitants of Williamstown, 1 Cush. 452; Joch v. Dunkwardt, 85 Ill. 333; Lynch v. Knight, 9 H. L. Cases, 577, 598; Johnson v. Wells, Fargo & Co., 6 Nev. 225; Sherman & Redfield on Negligence, secs. 606, 606b; Fruse v. Tripp, 70 Ill. 503; Misall v. Anthis, 71 Ill. 241; Blake v. Midland Ry. Co., 10 Eng. L. & E. 442.

No actual damages being shown to sustain the action, evidence which, in favor of the plaintiff in this case, could only bear upon the question of exemplary damages, and averments of a like kind, can be of no avail, for unless some actual damage had been sustained by the plaintiff he is not entitled to exemplary damages. Flanagan v. Womack, 54 Tex 50; Fruse v. Tripp, 70 Ill. 500.

The English cases held substantially that a person to whom a message is sent, cannot maintain an action, notwithstanding pecuniary injury may result to him by the failure of a telegraph company correctly or within a reasonable time to transmit it, unless the sender sustains to the person to whom the message is sent the relation of agent, through which privity of contract is established. Playford v. The United Kingdom Electric Telegraph Co., 4 Q. B. 706.

This doctrine has not been accepted by the courts of this country, but none of them have gone to the extent of holding that the person to whom the message is sent may maintain an action for the negligence of a telegraph company in transmitting, without averment and proof of some actual pecuniary injury sustained thereby.

We are referred to the case of SoRelle v. W. U. Telegraph Co., 55 Tex, 310, as an authority for the proposition that an action for mental suffering alone may be maintained. The opinion in that case does not seem to contain the proposition necessary to sustain this action; but we are of the opinion that it cannot be sustained upon the principle, nor upon the authority of adjudicated cases.

The other assignments need not be considered, in the view which we take of the case. The demurrer to the petition in this case should have

been sustained, but as it was overruled the judgment will be reversed and the cause remanded, that an opportunity to amend the petition may be given and a case stated, if possible, which appears unlikely from the evidence, upon which the action may be sustained.

Reversed and remanded.

EX POST FACTO LAW—MURDER—CHANGE IN THE EFFECT OF A PLEA OF GUILTY.

GARVEY v. PEOPLE.

Supreme Court of Colorado, May 11, 1883.

1. A law enacted after event, which alters the situation of one accused of crime to his disadvantage, is *ex post facto* and void.

2. A law enacted after the commission of an offense which alters the effect given to a plea of guilty to the disadvantage of one accused of such offense is, as far as he is concerned, *ex post facto* and void.

Error to the District Court of Arapahoe County.

BECK, C. J., delivered the opinion of the court: At the March term, 1881, of the Weld county district court, the plaintiff in error, was indicted for the murder of one George Wolf. The crime was charged to have been committed in said county on the 23d day of May, 1880. The prisoner plead not guilty to the indictment. A change of venue was applied for and the venue changed to Arapahoe county, where the cause was tried at the special November term of the district court of said county, resulting in a verdict of "guilty as charged in the indictment." Upon the verdict the prisoner was sentenced to imprisonment at hard labor in the State penitentiary for the residue of his natural life.

It is assigned for error that the court erred: First, in denying motion for continuance: Second, in denying motion in arrest of judgment; Third, in giving judgment on the indictment, no offense being charged therein, and there being no law to warrant judgment upon the said indictment. Only the second and third assignments are relied upon for a reversal, and no objection is pointed out to the form of the indictment.

Two principal propositions are laid down and discussed by counsel for the prisoner, viz: First, That after the commission of the alleged offense and before trial, the law applicable to such cases was so amended as to change the rule of evidence and increase the punishment. Second. That the law under which the offense was committed was repealed before the trial, without a saving clause and there was no law in existence when the trial was had against which the defendant had offended.

As the law stood prior to 1870, there was in Colorado but one grade of murder, and one mode of punishing the offense, which was death by hanging. (Section 20 and 183, chapter 22, R. S.,

1868.) Section 20 provided that "the punishment of any person or persons convicted of the crime of murder shall be death."

In 1870 the legislature amended sec. 20 as follows: Section 1. That sec. 20 of said chapter 22 of the revised statutes of Colorado Territory shall be hereafter construed so that the death penalty for the crime of murder shall not be ordered to be inflicted by courts of the territory, unless the jury trying the case shall, in their verdict of guilty, also indicate that the killing was deliberate or premeditated; or was done in the perpetration or the attempt to perpetrate some felony. Sec. 2. Any person hereafter found guilty of the crime of murder by the verdict of a jury without any indication in such verdict, whether the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony shall be sentenced to confinement in the penitentiary, for and during such person's natural life; which confinement may be, with or without hard labor, or both, at the discretion of the court. Laws 1870, pp. 70, 71.

The above sections 1 and 2 of the act of 1870 were inserted in chapter 24 of the compilation of the statutes in 1877, as secs. 268 and 269 of the criminal code (G. L. 1877, pp. 339, 340), and are referred to by the last mentioned numbers in the legislation of 1881. The law remained as thus amended until the passage of the act of March 1, 1881, when secs. 268 and 269 were repealed, and two other sections enacted to stand in lieu thereof, numbered respectively sec. 3 and sec. 4 of said act, as follows: Sec. 3. Sec. 268 of said chapter is hereby repealed, and the following shall stand in lieu thereof as sec. 268.

"The death penalty for the crime of murder shall not be ordered to be inflicted by the courts of this State in any case unless the jury trying the case shall in their verdict of guilty, also indicate the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony, or unless the jury, in case where the defendant pleads guilty, and the jury to whom the question of deliberation or premeditation or that the killing was done in the perpetration or attempt to perpetrate some felony, shall be submitted as hereinafter provided; shall in their verdict upon that question indicate that the killing was deliberate or premeditated or was done in the perpetration or attempt to perpetrate some felony.

In case where the the party indicted for the crime of murder shall plead guilty thereto, and persist therein, the court thereupon shall impanel a jury, as in other cases, to whom shall be submitted and who shall hear and determine the question and vindicate (indicate) in their verdict whether or not the killing was deliberate or premeditated, or was done in the perpetration or attempt to perpetrate some felony; and in such case, that question and none other shall be submitted to the jury."

Sec. 4. Sec. 269 of said chapter is hereby repealed, and the following shall stand in lieu

thereof, as sec. 269: Any person hereafter found guilty of the crime of murder by his plea of guilty in case such plea is received, or by the verdict of a jury, where a trial is had without any confession in such plea, or indication in such verdict whether the killing was deliberate or premeditated or was done in the perpetration or attempt to perpetrate some felony, shall be sentenced to confinement in the Penitentiary for and during such person's natural life; which confinement may be with or without hard labor, at the discretion of the court. Laws 1881, pp. 70, 71.

In support of the proposition that the legislation of 1881 had the effect to change the rule of evidence and to increase the punishment, the prisoner's counsel made the point that, as the law stood at the time the offense was committed, a prisoner had the right to plead guilty, and by so doing escape all hazard of a death sentence. This plea, they say, was conclusive of the prisoner's innocence of murder in the first degree, and conclusive of murder in the second degree; that the court was bound to accept the plea, and to render judgment thereon for the lower grade of murder, without an examination of facts for the purpose of ascertaining the degree of guilt, and that such was the practice adopted by the district courts.

Many authorities are cited in support of the propositions, that a plea of guilty to an indictment for homicide only confesses the guilt of the accused as to the lowest grade of the offense; that it authorizes the same judgment as does a general verdict of guilty returned by a jury, which is held to be responsive to the lowest degree of the crime charged in the indictment. These propositions are fully supported by the authorities cited as to cases wherein the indictment is in the common law form. 2 Bish. Crim. Proc., sec. 506, note 4, and cases cited.

There is a strong reason why no greater effort should be given the ordinary plea of guilty, under the statutes of the State; as they existed prior to the amendment of 1871, than that accorded to a general verdict of guilty. The reason is that the statutes require the grade of the offense to be ascertained by the verdict of a jury before the death penalty could be ordered to be inflicted. To authorize a sentence of death, the jury were required to find and indicate in their verdict that the killing was deliberate or premeditated, or was done in the perpetration, or attempt to perpetrate, some felony. But no provision was made for submitting to a jury the question of the grade of the offense when the defendant pleaded guilty. It was not required that these circumstances of aggravation should be charged in the indictment, but on the other hand the common law form of indictment was prescribed as sufficient in all murder cases. Laws of 1879, p. 50.

Under these statutes a verdict of "guilty in manner and form as charged in the indictment," was in all cases a conviction of the lower grade of murder. Although the indictment charged that it was committed with premeditation or un-

der any of the other circumstances which constitute murder of the higher grade; the effect of a general verdict of guilty was the same. The only sentence that could be awarded was imprisonment, with or without hard labor, in the penitentiary for the life of the offender.

We can conceive of no satisfactory reason why a plea of guilty in "manner and form, as charged in the indictment," should not have the same effect as the verdict of a jury in the same form.

Whether the court was bound to accept such plea and to render judgment of imprisonment thereon, without instituting further proceedings to ascertain the degree of guilt, may admit of some doubt, but that such was the practice must be conceded. It was under this construction of the statute that Philomena Gallotti and six or seven other Italians were sentenced to confinement in the penitentiary for life on their plea of guilty for the murder of four Italian musicians. And while it was generally deplored that the statute permitted the perpetrators of that horrible assassination to escape the severest penalty of the law, yet we are not aware that the soundness of the ruling has been questioned. Whether correct or not, however, such being the recognized practice, the effect was the same as if it had been duly authorized; persons indicted for murder could avail themselves of it without risk, since the statute gave neither an appeal or writ of error in favor of the people. Even if they did it would probably be unavailing in such a case. The Constitution of this State provides that no person shall be twice put in jeopardy for the same offense. When a prisoner is arraigned upon a sufficient indictment, his plea has been accepted and recorded, not only as a confession of his guilt but as evidence of the degree of guilt and final judgment entered thereon; a new trial subjecting him to the hazard of a conviction for a higher grade of offense, would not only appear to be in violation of the Constitution, but in conflict with the great weight of authority on the point. 1 Bishop Cr. L. 992, 1024 and cases cited. It is evident that the legislature recognized this construction of the law as being settled in accordance with the practice referred to, from the changes made therein by that body in 1881. These changes relate only to the effect of the plea of guilty.

The intent of the legislature in this behalf is not as intelligibly expressed as it might be, but that it was intended to change the effect heretofore accorded the plea of guilty so that the death penalty might be imposed, notwithstanding the plea, is apparent. This is the only construction which the language employed is susceptible of, that will not produce absurd consequences. Judge Ranney says in *Debolt v. Ohio Life Insurance and Trust Company*, 1 Ohio St. 563, that "the legislature will not be presumed to have intended an absurd or unjust consequence." Chief Justice Shaw said, "We can only ascertain the legal intent of the legislature by the language they have used, applied and expounded conform-

ably to the settled and well-known rules of construction." *Commonwealth v. Kimball*, 21 Pick. 376. Mr. Sedgwick says that, in construing a statute, Lord Coke's rule is to be kept in view, and the judges are to inform themselves of the previous state of the law, and of the mischiefs which the statute to be construed was passed to obviate. *Sedgwick's Stat. and Con. Law*, 202. Giving effect, then, to the obvious meaning of the statute, we approach the inquiry. What effect did the change in the law produce upon the legal rights of the prisoner? As the law stood on the 23d day of May, 1880, when the murder was committed, any person indicted for murder had it within his power to avoid all risk of a capital sentence by pleading guilty. In November, 1881, the time of the trial, this privilege did not exist; it had been taken away by the act of March 1, 1881.

The Constitution of the United States prohibits each State from passing *ex post facto* laws. The mandate of our State Constitution is that no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operations * * shall ever be passed by the General Assembly. The leading case upon laws of this character is *Calder v. Bull*, 3 Dallas, 386, decided by Justice Chase in the Supreme Court of the United States in 1798. He said: "I will state what I consider *ex post facto* laws within the words and the intent of the prohibition: First. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. Second. Every law that aggravates a crime and makes it greater than it was when it was committed. Fourth. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

It is argued with much plausibility by the prisoner's counsel that the statute has been so changed that what was before received as conclusive evidence of innocence, as to the higher grade of the offense, *viz.*: a plea of guilty, has, under the new act, no effect as evidence for the prisoner at all.

In a recent opinion in the Supreme Court of the United States, by Mr. Justice Miller, this subject was very fully considered, and the most important cases cited and reviewed. Among the cases cited approvingly, and which seems peculiarly appropriate to the present case, is *United States v. Hall*, Washington, C. C. 366, afterwards affirmed by the Supreme Court in 6 Cranch. 171.

Mr. Justice Washington said, in this case, that "an *ex post facto* law is one which in its operation makes that criminal which was not so at the time the action was performed, or which increases the punishment, or, in short, which in relation to the offense or its consequences, alters the situation of a party to his disadvantage." By way of application to the case on trial, which was for the violation of the embargo laws, he added: "If the enforcing law applies to this case there can be no

doubt that so far as it takes away or impairs the defense which the law had provided the defendant at the time his bond became forfeited, it is *ex post facto* and inoperative." Another case cited by Mr. Justice Miller, and which illustrates the extent to which the doctrine is carried, is that of *Commonwealth v. McDonnough*, 95 Mass. 581. "It was held," says the learned justice, "that a law passed after the commission of the offense of which the defendant stood charged, which mitigated the punishment, as regarded the fine and maximum of imprisonment that might be inflicted under an *ex post facto* law as to that case, because the minimum of imprisonment was made three months, whereas, before there was no minimum limit to the court's discretion. This slight variance in the law was held to make it *ex post facto* and void as to that case, though the effect of the decision was to leave no law by which the defendant could be punished, and he was discharged, though found guilty of the offense."

Among the other cases cited and referred to in this able opinion of Mr. Justice Miller, are: *Hartung v. the People*, 22 N. Y. 95; *In re Petty*, 22 Kansas, 95; *State v. Keith*, 63 N. C.; *State v. Tweed*, 25 Tex. Sup., 66; *Shepherd v. the People*, 25 N. Y. 406; *Green v. Shumway*, 38 N. Y. 418.

The case above referred to as being recently decided by the Supreme Court of the United States, was that of *Kring v. State*, error to the Supreme Court of the State of Missouri, reported in *Central Law Journal*, April 20, 1883. [16 C.L.J. 308.] Kring was indicted for murder, and upon his plea of guilty, was convicted of murder in the second degree and sentenced to twenty-five years imprisonment. He appealed and the judgment was reserved. By the law of Missouri, in force when the homicide was committed, this conviction was an acquittal of the charge of murder in the first degree, but the law was subsequently so changed by an amendment to the State Constitution that when a judgment on a plea of guilty should be lawfully set aside it should not be held to be an acquittal of the higher crime. He was subsequently tried several times before a jury, his plea having been set aside by the trial court and a plea of not guilty entered by order of the court, and upon the last trial he was found guilty of murder in the first degree and sentenced to be hanged. The judgment was affirmed, first by the Court of Appeals and afterward by the Supreme Court of the State, these courts taking the position that the change in the law having been effected before the plea and judgment were entered of guilty of murder in the second degree, and that as the new law was in force when the conviction on that plea was had, its effect, as to future trials in that case must be governed by that law; that the change was not a change in crimes, but in criminal procedure, and that such changes are not *ex post facto*. Referring to this ruling, Justice Miller asks and answers the pertinent question: "Can any substantial right which the law gave the de-

fendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because in the use of a modern phrase it is called a law of procedure? We think it can not." In another part of the opinion he says: "Whatever may be the essential nature of the change it is one which, to the defendant, involves the difference between life and death, and the retroactive character of the charge cannot be denied." The judgment of the State court was reversed upon the ground that "the provision of the Constitution of Missouri which denies to the plaintiff in error the benefit which the previous law gave him, of acquittal of the charge of murder in the first degree on conviction of murder in the second degree, is as to his case an *ex post facto* law within the meaning of the Constitution of the United States."

Applying the principles of the above authorities to the questions raised by the assignments of error in the case at bar, it would seem that the act of March 1, 1881, has changed the law of this State to the disadvantage of those indicted for murders previously committed. These principles have no reference to convictions under a statute before its repeal.

Attorney-General Toll takes the position that the law of 1870 was substantially re-enacted by the later statute which had the effect to continue the law in force without intermission, citing *Bishop on Stat. Crimes*, section 181, *State v. Gumber*, 37 Wis., 298, and several other Wisconsin cases to the same effect, and a few other cases. Upon this hypothesis he argues that the recent legislation did not change the law applicable to the case of the plaintiff in error, upon his plea of not guilty.

Were it conceded that the authorities cited are sound the answer to this argument is that the pre-existing law relating to the crime of murder and its consequences was not substantially re-enacted. On the contrary, a substantial defense to murder in the higher grade was taken wholly away by the change made in respect to the plea of guilty. This plea, as it existed under the former law, has now no existence at all, practically, so far as this offense is concerned. Formerly, it operated as an acquittal of the highest grade of the offense. As it now exists, it is more unfavorable to the party pleading it than the plea of not guilty, there is a chance for acquittal, the present plea of guilty insures conviction as to the lower grade, leaving the accused to take the same risks of conviction of the higher grade as under the other plea.

This defense, under the former practice, was available as to the crime of murder and its consequences, and the accused had the legal right to avail himself of the immunity from a death sentence at any time before conviction. It cannot militate against the plaintiff in error that he did not at his trial seek to take advantage of a defense which had previously been taken away from him.

Again, the two sections of the act of 1870; dividing murder into two grades, and specifying the punishment to be awarded those convicted under each, were expressly repealed by the act of 1881, without a saving clause, and two other sections were substituted therefor. There could, therefore, be no conviction under the sections repealed. *Hirschberg v. The People*, 2 Colorado L. R. 381.

All that remained unrepealed of the law of homicide (save the provisions relating to manslaughter and its punishment), were the sections defining the crime of murder, providing the form of indictment and imposing the death penalty upon such as should be convicted. It is clear that the accused could not be convicted of murder under those provisions alone, since the punishment for that offense had been changed from imprisonment, or death, as the proof might warrant, to death only, an increase of the punishment which made the law obnoxious to the constitutional inhibition.

Nor could he be legally convicted of murder in the highest degree under the new law, considered and construed in connection with the unrepealed sections of the old law, as suggested by the Attorney General, for the reason that this law deprived the prisoner of a right of defense existing in his favor at the time of the commission of the crime, which, if employed, would have saved his life. This right did not exist at the time of the trial, and the people, whose representatives had taken it away, could not be heard to say the prisoner would not have availed himself of it. If it be sought to convict him of murder of the second grade only, an anomaly in statutory construction and procedure is encountered. The indictment sufficiently charges murder of the higher grade. The law prescribes the death penalty only, for this degree of the offense; there is no plea, which of itself authorizes a conviction in a lower degree, and yet the jury must be instructed, contrary to the letter and spirit of the law, that they can not find the the prisoner guilty of murder in the higher degree. The statute will not bear such a construction. The attempt to apply the statute to past offenses develops as to them its retro-active character.

There seems to be no escape from the conclusion that the change produced in the law by the act of 1881, in relation to crime of the grade of murder, previously committed, alters the situation of a party to his disadvantage, and makes the law *Ex post facto*, both under the Federal and State constitutions. This is substantially the conclusion reached by the Supreme Court of the United States in *Kring v. State*, *supra*. The language of the court is: "We are of the opinion that any law passed after the commission of an offense, which, in the language of Washington, in *United States v. Hall*, in relation to that offense, or its consequences, alters the situation of a party to his disadvantage, is an *ex post facto* law, and in the language of Denio in *Hartung v. The People*, no

one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time."

The conclusion arrived at in this case was reached after a careful examination of authorities and after mature deliberation. In the language of the Supreme Court of Massachusetts, "though it is desirable that all offenders against our penal laws should be punished, yet it is better that one should occasionally escape than that the fundamental principles of the criminal law should be violated." *Commonwealth v. McDonough*, *supra*.

As the amendments to the criminal code made by the legislature in 1883, have no application to this case, they have not been referred to in this opinion.

The judgment is reversed and the cause remanded.

Judgment reversed.

DRAMSHOP—"BITTERS"—LICENSE.

STATE V. LILLARD.

Supreme Court of Missouri, June, 1883.

It is an indictable offense to sell "bitters" compounded of medicines and intoxicating liquors without having a dramshop or other license authorizing the sale, notwithstanding the same is authorized and stamped by the United States to be sold as "bitters," without any further license to sell the same as a liquor dealer.

RAY, J., delivered the opinion of the court:

This is an indictment in the Schuyler circuit court for unlawfully selling intoxicating liquors in quantities less than one gallon, without taking out a license as a dramshop keeper, and without having any other license or legal authority so to do. The indictment was found at the March Term, 1879, for a sale made in February preceding. The defendant pleaded not guilty. A trial was had before a jury, and plaintiff, to sustain the issues on his side, offered evidence tending to show that the defendant, in July, 1878, sold to certain persons a "compound," of which intoxicating liquor was a part, as a beverage. The defendant also offered evidence in his behalf tending to prove that the compound sold in this case was a "bitters" composed of different medicines, authorized and stamped by the United States, as a "bitters," the same being proprietary medicines; that the United States did not require the dealer to have a license as a liquor dealer to sell the same.

The court gave for the plaintiff several instructions to the effect that if defendant unlawfully sold intoxicating liquors in less quantities than one gallon he was guilty, unless he believed in good faith that the same was for medicinal pur-

poses, and needed as such; that if the defendant sold "bitters," of which whisky was a compound part, and intoxicating, then defendant is guilty, unless the same was sold for medicinal purposes, and not as a beverage; that United States government license does not authorize the defendant to sell "bitters" or intoxicating liquors in violation of the laws of the State.

The defendant asked an instruction to the effect, that if the article sold in this case was a "bitters" put up by the defendant and authorized and stamped by the United States as a medicine, then the jury must acquit, although said "bitters" contained liquor, and was intoxicating, which the court refused to give.

The defendant was found and adjudged guilty, and after unsuccessful motions for a new trial and arrest of judgment, appealed to this court.

The sole question is, did the court err in refusing the above instruction asked by defendant or in giving the converse thereof for the State? The statute law of this State, in force at the date of the above indictment and sale, makes it a criminal offense for any person to sell intoxicating liquors in any quantity less than one gallon without a license for that purpose. 1 Wag. St., ch. 48, sec. 2, p. 549. The 27th section of same chapter 554 also declares that "the term intoxicating liquor," as used in this chapter, "shall be construed to mean fermented, vinous or spirituous liquor, or any composition of which fermented, vinous or spirituous liquors are a part, and all the foregoing provisions shall be liberally construed as remedial in their character," yet the foregoing instruction asked by the defendant asserts the proposition that the article sold in this case was bitters put up by defendant and authorized and stamped by the United States as a medicine, then the jury must acquit, although said bitters contained liquor and was intoxicating. Such manifestly is not the law. It has been expressly held elsewhere that neither the payment of the United States excise tax, nor a license from the United States revenue collector, will justify the sale of intoxicating liquor in violation of the law of a State. In the case of the State v. Delano, 54 Me. 501, this doctrine is distinctly announced. So also in the case of McGain v. Commonwealth, 3 Wall. 387, the Supreme Court of the United States held that "a license granted by the United States under the internal act of July 1, 1862, to carry on the business of wholesale liquor dealer in a particular State named, does not, although it had been granted in consideration of a fee paid, give the licensee power to carry on the business in violation of the State laws forbidding such business to be carried on within its limits." The doctrine of these cases is applicable to the case at bar, and correctly states the law of the case. For these reasons the judgment of the circuit court is affirmed.

All concur.

RECENT LEGAL LITERATURE.

BATEMAN ON AUCTIONS. A Practical Treatise on the Law of Auctions, with Forms and Directions to Auctioneers. By John Bateman, LL.D., of Lincoln's Inn, Barrister at Law. Sixth Edition, by Oliver Smith and Patrick F. Evans, Esqs., of the Inner Temple, Barristers at Law. First American Edition, with Notes and Laws of the Several States. By Henry N. Sheldon. Boston, 1883: Soule & Bugbee.

This is an excellent work, thoroughly practical in its nature and exhaustive in the citation of authorities. In the preparation of the American notes (with which the average practitioner in this country is particularly concerned), it is evident that labor and pains have not been spared. The resume of State statutes in the appendix is thorough and complete. The mechanical execution, as usual in works issued by this firm, is of the best.

BISHOP ON STATUTORY CRIMES. Commentaries on the Law of Statutory Crimes, including the Written Laws and their Interpretation in General, What is special to the Criminal Law and the Specific Statutory Offenses as to both Law and Procedure. By Joel Prentiss Bishop. Second Edition re-written and enlarged. Boston, 1883. Little, Brown & Co.

This volume is intended to supplement Mr. Bishop's two volumes entitled Criminal Law and the two entitled Criminal Procedure and completes the series covering the whole field of American Criminal Law, Criminal Evidence, Criminal Pleading and Criminal Practice, both at common law and under the statutes. The entire group of works are too well known for this last volume to require any particular description at our hands.

WOOD ON LIMITATIONS OF ACTIONS.—A treatise on the Limitations of Actions, at Law and in Equity, with an Appendix containing the English and American Statutes on Limitations. By H. G. Wood, Boston, 1883; Soule and Bugbee.

The *raison d'être* of this work as stated by the author in his preface is the radical changes wrought in the statutes of limitations in the several States of this country within the last twenty years, and in the theories applicable thereto, rendering a new work, adapted to the present condition of the statute indispensable. There is undoubtedly a substantial need for a work of this character and volume before us will therefore be likely to meet with a warm welcome at the hands of the profession. The work is handsomely printed and well bound.

WEEKLY DIGEST OF RECENT CASES.

FLORIDA	5
IOWA,	9
MICHIGAN,	3, 8, 11
WISCONSIN,	6
FEDERAL SUPREME COURT,	1, 2, 4, 10, 12, 13
FEDERAL CIRCUIT COURT,	7

1. ADMIRALTY—CONTRACT OF AFFREIGHTMENT—UNSEAWORTHY VESSEL.

Where a vessel, before she breaks ground for a voyage, is so injured by fire that the cost of her repairs would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of affreightment for the carriage of cotton by her to a foreign port, evidenced by a bill of lading, containing the usual and customary exceptions, and providing for the payment of the freight money on the delivery of the cotton at that port, is thereby dissolved, so that the shipper is not liable for any part of the freight money, nor for any of the expenses paid by the vessel for compressing and stowing the cotton. *The Tornado*, U. S. S. C., April 30, 1883; 2 S. C. Rep., 746.

2. ADMIRALTY—SALVAGE SERVICE—EXCESSIVE DECK.

A ship towed by a steam-tug down a river came to anchor in the evening, and the tug was lashed to her side. In the night, no watch having been set, a passenger on board of her was awakened by a smell of smoke arising from a fire, which had broken out in part of the cargo stored in the poop, and which endangered the ship and cargo. He gave the alarm to the officers and crews of the ship and of the tug; and he and the officers, crew and passengers of the tug, working together, and by means of a steam pump and hose upon the tug, and unaided by the officers and crew of the ship put out the fire in twenty minutes. *Held*, that this was a salvage service, and that the passenger on board the ship, as well as the owner, officers, crew and passengers of the tug, might share in the salvage. Under the act of congress of February 16, 1875, c. 77, a decree of salvage by the circuit court is not to be altered by this court for excess in the amount awarded, unless the excess is so great that, upon any reasonable view of the facts found, the award can not be justified by the rules of law applicable to the case. *The Cannemara and the Joseph Cooper, Jr.*, U. S. S. C., April 30, 1883; 2 S. C. Rep. 754.

3. ATTORNEY AND CLIENT—EVIDENCE—PRIVILEGE.

The privilege of secrecy as to what passes between attorney and client is the privilege of the client, and he may testify as to what advice he acted under in a matter, or the attorney may, with the client's consent, testify as to what advice he gave in regard thereto. *Passmore v. Passmore's Estate*, S. C. Mich., June 13, 1883; 16 N. W. R. 170.

4. CONSTITUTIONAL LAW—ASSIGNMENT FOR BENEFIT OF CREDITORS—BANKRUPT ACT.

Except as against proceedings instituted under the bankrupt act for the purpose of securing the administration of the property in the bankruptcy court, an assignment, made in accordance with the provisions of an act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors, "passed by the legislature of New Jersey on

the 16th of April, 1846, by a citizen of that State, without intent to hinder, delay, or defraud his creditors, is valid, at least for the purpose of securing an equal distribution of his estate among his creditors, in proportion to their several demands; and a receiver, appointed in supplementary proceedings, after judgment in a suit instituted in New York by a creditor residing in that State, is not entitled, by reason of any conflict between the local statute and the bankrupt act of 1867, or by force of the judgment and the proceedings thereunder, to the possession of the assigned property, or of its proceeds, as against the assignee, or to a priority of claim for the benefit of the judgment creditor upon such proceeds. *Boese v. King*, U. S. S. C. April 30 1883; 2 S. C. Rep. 765.

5. CONTRACT—MUNICIPAL CORPORATION—VOLUNTEER FIRE COMPANY—COMPENSATION.

No obligation to pay the members of a volunteer association for the extinguishing of fires in municipal corporation arises or is implied from the simple rendition of such service, and where they claim compensation the burden of proof is upon them to show a contract to that effect. *Jacksonville v. Aetna Steam Fire Engine Co.*, S. C. Fla., June T., 1883.

6. CRIMINAL LAW—MEDICAL WORKS IN EVIDENCE.

Medical books cannot be introduced in evidence, nor can a physician be permitted to give extracts from such books as evidence depending upon his memory for their correctness. It is equally inadmissible to permit the reading of such books to the jury by counsel in their arguments. *Boyle v. State*, S. C. Wis., May 31 1883; 15 N. W. R. 827.

7. EQUITY—FORMATION OF COMPANY TO KEEP CREDITORS AT BAY.

The formation of a company to keep the creditors of an insolvent concern at bay, and to provide it with capital to continue business unmolested by said creditors, is a scheme that can receive no aid from a court of equity. *Baltimore Iron Co. v. Brooke*, U. S. D. C. E. D. Pa.; 15 Ch. Leg. N. 336.

8. EXECUTION—EXEMPT PROPERTY.

Creditors have no rights as against property exempt from execution, and the officer making the levy is as much bound to respect such exemption, where the property is that of a partnership, as in other cases. *Waite v. Mathews*, S. C. Mich., April 25, 1883; 1 Derv. L. J. 110.

9. HOMESTEAD—CONTRACT FOR CONVEYANCE—SPECIFIC PERFORMANCE—WIFE'S SIGNATURE.

A contract for the conveyance of a tract of land, a part of which is occupied as a homestead, to be specifically enforced must be executed jointly by husband and wife. Whoever contracts for another person's homestead should see to it that he gets the wife's signature, and when this is not obtained it is not to be considered as a case of fraud, but rather as the case of an incomplete and unconsummated contract, not binding on either party; and it is doubtful whether, in such a case, anything could be recovered as damages for a breach of the contract, except the purchase money paid and interest. In this case the payment was not made in money, but by a certificate of deposit, which defendant tendered in court, and the court was justified in denying all recovery of damages to plaintiff for a failure to convey the land as contracted. *Donner v. Redenbaugh*, S. C. Iowa, June 12, 1883; 16 N. W. Rep. 127.

10. INSURANCE—AGREEMENT CONSTRUED—LIABILITY NOT JOINT.

Certain insurance companies executed the following agreement: "The undersigned insurance companies, having policies outstanding issued to Taylor, Randall & Co., upon property at central wharf, Boston, upon which claims have been made against said companies, do, in consideration of one dollar, by each paid to the other, and divers other good and valuable considerations, mutually covenant and agree to and with each other as follows; that is to say: the said companies will unite in resisting the claim made upon said policies, and on each thereof, and in the defense of any and all suits and legal proceedings that have been or may be instituted against any of said companies upon any of said policies, and will, when and as required by the committee hereinafter mentioned, contribute to pay the costs, fees, and expenses of said suits and proceedings *pro rata*; that is to say, each company shall pay such proportion of said costs, fees, and expenses as the amount insured by said company shall bear to the whole amount insured on said property by all the companies subscribing to this agreement. The management and conduct of said resistance to said claims and defense of said suits and proceedings shall be and is fully entrusted to and devolved upon a committee to be composed of W. H. Brazier and James R. Lott, of the city of New York, Charles W. Sproat, of the city of Boston, L. S. Jordan, of the city of Boston, which committee shall have full power and authority to employ counsel and attorneys to appear for said companies and each thereof, and defend said suits and legal proceedings, and to employ other persons for other services relative thereto, and to assess upon and demand and receive from time to time as such committee shall deem proper, such sum or sums of money for the compensation of such counsel and attorneys and such other persons, and all other expenses of such defense of said suits, as said committee shall deem necessary and expedient, such assessment upon and payment by each of said companies to be *pro rata*, as above mentioned. "Each and every of said companies shall fully and faithfully adhere to this agreement, and shall refrain from any act or proceeding in reference to such claims or suit, or the defense thereof, that can or may in anywise defeat, obstruct, or interfere with the acts or proceedings of said committee relative thereto and shall at all times furnish to said committee any and all papers information, and assistance in and about such management and conduct of such resistance and defense as may be in the possession or power of said companies respectively, and as may be desired by said committee." After this agreement had been signed the committee named in it employed defendant in error as counsel on behalf of all the companies parties to it. *Held*, in an action to recover for professional services rendered, that the agreement was not one under which any joint liability could be created, and that the parties thereto were only to pay severally and *pro rata* any amount that should become due thereunder. *Adriatic Fire Ins. Co. v. Treadwell*, U. S. S. C., April 30, 1883; 2 S. C. Rep. 772.

11. LIEN—OFFER OF PERFORMANCE—EXTINGUISHMENT.

In order that an offer of performance should operate as performance itself, and extinguish a lien, it should be unequivocal, and reasonably capable of being understood by the other party as a *bona fide* tender of the requisite thing, act or service; and the verbal elements should be accompanied

by circumstances fairly implying control of the necessary means and possession of the necessary ability. *Selby v. Hurd*, S. C. Mich., June 13, 1883; 16 N. W. R. 180.

12. NATIONAL BANK—LOAN ON CAPITAL STOCK—REVISED STATUTES.

If section 5201 of the Revised Statutes, which prohibits a national banking association from making a loan upon the security of shares of its own stock, can be urged against the validity of such a transaction by any one except the government, it can be done only before the contract is executed and while the security is still subsisting in the hands of the bank. When the contract has been executed, the security sold, and the proceeds applied to the payment of the debt, the courts will not interfere with the matter. *First Nat. Bank of Xenia v. Stewart*, U. S. S. C., April 30, 1883; 2 S. C. Rep. 778.

13. REVENUE LAW—MANUFACTURES OF IMPORTED MATERIALS—DRAWBACK.

Claimants having imported from Calcutta large quantities of linseed upon which they paid the duty according to law, without intermixture with any other linseed or other material, manufactured it into linseed oil and linseed cake, exported a large quantity of the cake so manufactured, and after complying in all respects with the regulations prescribed by the secretary of the treasury, in pursuance of the requirements of the act of Congress of August 5, 1861, which provides that "there shall be allowed, on all articles wholly manufactured of materials imported, on which duties have been paid, when exported, a drawback equal in amount to the duty paid on such material, and no more, as prescribed by the secretary of the treasury," claimed a drawback on the amount so exported at the rate fixed by the regulations established by the secretary of the treasury, but the collector, acting under instructions from the secretary, refused to proceed under these regulations or in any other mode. *Held*: (1) That the right to the drawback not being founded on the regulations of the secretary of the treasury, but conferred by the act of Congress, it cannot be defeated by a failure of the secretary to make proper regulations or a refusal of the custom officers to execute the regulations made; and that as the function of the officers of customs, including the secretary, in regard to this law, is entirely ministerial, they have no authority to ascertain or decide conclusively upon the right to drawback. (2) That the act of Congress having declared that on exportation there should be allowed a drawback equal in amount to the duty paid on such material, and the secretary having established by a regulation that, as regarded the cake resulting from the manufacture of the linseed into oil and cake, the latter represents, at seventeen cents per 100 pounds, the duty on the imported seed so converted into cake, there resulted a contract that when exported the government would refund this amount as a drawback to the importer. (3) That the court of claims has jurisdiction of such a claim because it is founded on an act of Congress, and because of the implied contract that the United States will refund to the importer the amount he has paid to the government. The purpose of the drawback provision is to make duty free, imports which manufactured in this country and not sold or consumed in the United States, but returned whence they came or to some other foreign country. *Campbell v. United States*, U. S. S. C., April 30 1883. S. C. Rep. 759.